Supreme Court, U.S.
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No. 00-1871

In the
Supreme Court of the United States

Andrew L. Manning, *et al.*,
Petitioners,

v.

The School Board of Hillsborough County, Florida
(formerly Board of Public Instruction of
Hillsborough County, Florida), et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. CROSBY FEW
FEW & AYALA
109 N. BRUSH STREET
SUITE 201
TAMPA, FL 33602
(813) 229-6401

THOMAS M. GONZALEZ
Counsel of Record
THOMPSON, SIZEMORE &
GONZALEZ, P.A.
TAMPA, FL 33602
(813) 273-0050

Counsel for Respondents

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), Respondent submits the following list of parties:*

1. The School Board of Hillsborough County, Florida (formerly known as the Board of Public Instruction of Hillsborough County, Florida), Respondent.

2. Joe E. Newsome, as Chairman of the School Board of Hillsborough County, Florida, Respondent.

3. Doris Ross Reddick, as Vice Chairman of the School Board of Hillsborough County, Florida, Respondent.

4. Glenn Barrington, as a Member of the School Board of Hillsborough County, Florida, Respondent.

5. Carolyn Bricklemyer, as a Member of the School Board of Hillsborough County, Florida, Respondent.

6. Carol W. Kurdell, as a Member of the School Board of Hillsborough County, Florida, Respondent.

7. Jack R. Lamb, Ed.D., as a Member of the School Board of Hillsborough County, Florida, Respondent.

8. Ann Olson, as a Member of the School Board of Hillsborough County, Florida, Respondent.

9. Earl J. Lennard, Ph.D., as the Superintendent of Schools for the School Board of Hillsborough County, Florida, Respondent.

10. The class of all African-American minor children who are eligible to attend the public schools of Hillsborough County, Florida, and their parents and/or next friends.

11. Andrew L. Manning, a minor, by his father and next friend, Willie Manning, Petitioner.

12. Shayron B. Reed, and Sandra E. Reed, minors, by their father and next friend, Sanders B. Reed, Petitioner.

13. Nathaniel Cannon, Norman Thomas Cannon, Tyrone and Darnel Cannon, minors, by their father and next friend, Nathaniel Cannon, Sr., Petitioners.

14. Gail Rene Myers, a minor, by her father and next friend, Randolph Myers, Petitioner.

* The individual Petitioners are listed here as they appeared in the caption of the original complaint filed in this case in 1958, at which time the then minor Petitioners, with their adult parents, were alleged to be adequate representatives of the class. The Petitioners have not included in their petition's List of Parties the next friends who were original parties to the complaint, and those Petitioners who were minors in 1958 obviously have reached majority. The Respondent is without knowledge as to what, if any, status any of the original Petitioners occupy in the current context of this proceeding, or the litigation from which it arises.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, the School Board of Hillsborough County, Florida, *et al.* ("School Board"), respectfully ask the Court to deny the petition for writ of certiorari filed by Petitioners Andrew Manning, *et al.*, who seek review of the decision of the United States Court of Appeals for the Eleventh Circuit entered in this case on March 16, 2001. The holding for which review is sought is a narrow one, based on the specific and unique facts of this case. It does not conflict with any decision of this Court or any Court of Appeals. Neither does it decide an important federal question, nor present any other basis warranting review by this Court.

STATEMENT OF THE CASE

In the case before the Court, the Eleventh Circuit declared the public schools of Hillsborough County, Florida, to be unitary after nearly forty years of court supervision. It reversed the holding of the United States District Court for the Middle District of Florida, in which that Court found that the schools were not unitary and declined to restore local control over the school system. The District Court reached this determination after rejecting a contrary conclusion contained in the report and recommendation of the Magistrate Judge, to whom the District Court had committed the issue of unitary status for trial and recommendation pursuant to 28 U.S.C.§ 636(b)(1)(C).

"Proper resolution of any desegregation case turns on a careful assessment of its facts." *Freeman v. Pitts*, 503 U.S. 467, 474 (1992). Therefore, the factual and judicial contexts in which the Circuit and District Courts reached their decisions was essential to their decision-making, as it is to the

determination of this petition. Petitioners' statement of the case is inadequate for the last purpose. The statement is largely dependent on selectively taken portions of the Court of Appeals' and District Court's orders, which have been taken out of context and argumentatively presented. The statement therefore omits much that is relevant and material.

This case began in 1958 with the filing of the Petitioners' complaint, which sought judicial intervention to end Respondents' racially segregated dual system of public education and to allow African-American children to "attend schools nearer their places of residence." Resp. App. 1b-7b. On August 21, 1962, the District Court held that Respondents were in fact operating an unlawfully segregated school system and ordered them to file a comprehensive plan for desegregation. Pet. App. 191a.[1] Over the next nine years following that order, Respondents submitted many such plans and the District Court entered a number of orders, several of which were appealed. *Id.*

The effectiveness, or lack thereof, of the various plans which Respondents submitted and implemented in the period between 1962 and 1971, was described at length in the District Court's order of May 11, 1971. Resp. App. 8b- 77b. That order was entered by the District Court acting *sua sponte* only twenty-one days after this Court, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), described the wide breadth of a district court's powers, and its

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[1]References to the appendix to the petition will be made by use of the symbol "Pet. App." and page number(s). References to the appendix to this brief will be made through use of the symbol "Resp. App." and page number(s). References to the petition itself will be made through use of the symbol "Pet." and page number(s).

obligation, to end and effectively remedy *de jure* racial segregation occurring in a public school system. Armed with that instruction, the District Court entered an order which began with a recitation of the history of Respondents' desegregation efforts, and made clear its dissatisfaction with the level of Respondents' commitment to desegregation as well as their lack of success in attaining it.

The District Court then focused its attention on what it referred to as "black schools," i.e., 15 of Respondents' schools having student populations which were all, or at least 90% African-Americans, and declared simply that "[Respondents] must desegregate all [such] schools." Resp. App. 24b, n.13, 64b-65b. Conceding that some of the segregation in Respondents' schools might be *de facto* rather than *de jure*, the District Court nevertheless concluded that "*all* of the predominantly black schools must be eliminated." Resp. App., 62b, n.48, emphasis added.

The District Court explained its concerns, and its intentions, noting in particular that:

> There is no evidence of any substantiality in the record supporting the position that segregation in Hillsborough County is attributable in any measurable degree to voluntary housing patterns or other factors unaffected by school board activity. As indicated earlier, the record makes plain that prior to and since 1954 certain schools in Hillsborough County have been set aside for black students and others for white students. With exceptions these schools remain racially identifiable. Over the years [Respondents] have submitted numerous plans for

> desegregation, not one of which has altered the naked fact that most blacks attend schools which are inordinately black whereas most whites attend schools in which there are no blacks or only minuscule numbers of blacks. The Court has been unable to locate a single instance where [Respondents] took positive steps to end desegregation at a black school and thereafter segregation returned fortuitously. Indeed, no serious attempt has ever been made to eliminate the many black schools. Based on experience, the court concludes that what resegregation there has been is a consequence of the continued existence of schools identifiable as white or black. Resp. App. 62b-63b.

To remedy this situation, the District Court ordered drastic and immediate action, intended to eliminate once and for all Respondents' ability to segregate students according to race, by doing away with *all* of the "black" schools which Respondents had used for that unlawful purpose, and, in addition, those schools at which African-Americans constituted at least 50% of the student population. The Court allowed Respondents only slightly more than thirty days in which to formulate a plan which was to be effective in the next school year, the start of which was then only four months away. Resp. App. 67b-68b. The plan was to have as its "primary objective" the "abolition of segregation in all schools in the county," and "in particular [those] now having a student population at least 50% black" (a requirement which involved 28 schools, including the 15 identified as "black" under the Court's 90% standard) *Id.*, 58b, n.45. In formulating the plan, Respondents were to:

> begin with the proposition that white black ratios of 86%/14% in the senior high schools, 80%/20% in the junior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation. Resp. App. 68b.

While it was left to Respondents to formulate the specifics of the desegregation plan, the District Court limited their discretion by specifying the particular desegregation tools which were to be used ("pairing, grouping, clustering, and use of satellite zones"), adding:

> In view of what has gone on before, any proposed desegregation by use of rezoning or gerrymandered zoning shall be supplemental, secondary, and alternative to desegregation by the techniques mentioned earlier . . . and shall not be in lieu thereof. Resp. App. 69b.

Respondents timely responded to the District Court's directive with a plan that would immediately eliminate *all* majority black schools. The plan was approved by the District Court on July 6, 1971. Resp. App. 78b-96b. Under the plan, which used only the tools favored by the District Court, the county's two "black" high schools would be closed and their entire student populations distributed in satellites among "white" high schools. Resp. App.82b-83b. All "black" junior high schools were closed and converted to seventh grade centers. African-American students formerly attending "black" junior high schools would attend seventh grade in one of these centers, with white students transported for that grade. For grades eight and nine, the African-American students, with a few exceptions, would be assigned in satellites to formerly "white" schools. All "black"

elementary schools would be closed and their buildings used for sixth grade centers, which would be attended by black and transported white students in that grade, and all black students would be distributed as satellites among "white" schools for the remaining elementary grades. Resp. App. 80b-81b.

In approving the plan, the District Court noted that although Petitioners "did not question the effectiveness of the plan in desegregating the school system," they did object to the fact that the elimination of "black" schools placed a disproportionate burden on black children, because no longer having the neighborhood schools which had been ordered closed, they would be transported in greater percentages than white children, who retained their schools. Resp. App. 84b-86b. The Court conceded the correctness of this assessment of relative burdens, but overruled Petitioners' objection, noting that:

> If each of the [majority black] elementary schools retained its character as grades one through six and each of the junior high schools retained its character as grades 7, 8, and 9, satellite zones would have to be utilized in order to bring whites into the formerly black schools. This would provide an invitation to either "white flight" or "black flight," or both. Resp. App. 84b-85b.

After rejecting Petitioners' objection, the District Court found that the plan submitted by Respondents "fully complies with the Court's [May 11, 1971] order . . . and the law and will result in the establishment of a unitary school system. . . ." Resp. App. 89b. In stark contrast to the criticism of Respondents contained in its May 1971 order, the District Court also wrote:

> The record reflects the procedure followed by [Respondents] in developing the plan. At hearing the Court commended [Respondents], their staff and attorneys for this procedure.... Without agreeing to the desirability of the Court's order [Respondents] followed it as being law. For the record the Court repeats its appreciation and commendation.
>
> As has been emphasized in previous orders, the school board has a continuing responsibility. [Respondents] represent that the plan can and will be effectuated. The Court will require that this be done. Resp. App. 89b-90b.

The plan was in fact fully implemented, at the beginning of the 1971-1972 school year. The result of that action, as the District Court found in its December 4, 1998, order denying unitary status, was that:

> In the 1971-1972 school year, [Respondents] *had* desegregated all Hillsborough County Schools, with regard to student assignment; no majority black school existed in the county. Pet. App. 62a, emphasis added.

There was no majority black school in operation in Hillsborough County in the 1971-1972 school year. No school in operation that year had ever been a "black" school, (although the buildings used for those schools now housed the single grade centers which would be attended by students of both races). Resp. App. 57b, n.44.

Additionally, at the District Court's direction, in the

year following implementation of the desegregation plan, and in each year thereafter, Respondents prepared two reports: one showing the racial compositions of student and staff populations at each county school, the other informing the District Court and Petitioners of any and all proposed changes to be made in the attendance zone of any school in the upcoming year, with the racial mix of students projected to result from that change. Each of these reports was filed with the District Court and served on Petitioners' counsel. *Id.* From 1971 until 1994, Petitioners did not file any objections to the existence of racially identifiable schools. Pet. App. 64a, 110a.

After reviewing the reports filed in late 1974 (the fourth school year of the plan's operation), the District Court issued on its own initiative an order noting that one of Respondents' 128 schools had become majority black, and four others had high percentage black student populations. Pet. App. 63a. The Court *sua sponte* directed Respondents to file a supplemental plan to address these situations. Pet. App. 63a. *Id.* That supplemental plan projected decreases in the percentages of black students at all of the schools in question. Those decreases did not occur at two of the schools. Pet. App. 64a. The District Court took no further action. At no time after the implementation of the supplemental plan, until the order of October 26, 1998, did the District Court find that Respondents had in any way failed to comply with their obligations under the desegregation plan, nor did the District Court order the formulation of any additional supplemental plan, nor the taking of any action addressed to the racial composition of students at any school. Pet. App. 64a.

In 1990, Respondents sought to establish a magnet program at Blake Junior High School, to reduce the percentage of African-American students attending it.

Petitioners objected, and the District Court therefore denied Respondents' request. To support of their objection, Petitioners, acting through the same counsel who represents them here, argued that:

> The basic structure of desegregation in [Respondents'] school system has remained constant and *effective* since 1971. Pet. App. 23a, n.21, emphasis added.

Petitioners also argued that the introduction of the proposed magnet school would "introduce more uncertainty about whether schools would *remain* desegregated." *Id.* emphasis added.

In 1991, the parties agreed to a conversion of Respondents' school system from a elementary-junior high-high school configuration to one based on elementary-middle-high schools "clustered" in geographic divisions of the county. Pet. App. 67a-69a. Under the proposal, the single grade centers which were in the original plan were to become magnet or middle schools. *Id.* The projected populations of each of the schools in these clusters, several of which included majority black schools, were agreed to by the parties and incorporated in the District Court's consent order. Resp. App. 100b-101b.

From the 1977-1978 school year to the time of hearing, Respondents made some 300 minor modifications in student assignments, for purposes other than racial balance. Pet. App. 65a. Each of these modifications was brought to the attention of the District Court and Petitioners prior to its implementation. None was rejected by the District Court. As noted in the Magistrate's first report and recommendation, Petitioners "filed no objection nor otherwise complained to

the [District] Court about the existence of 'racially identifiable schools' even though such schools had existed . . . almost continuously since 1971." Pet. App. 299a. The District Court, while rejecting the Magistrate's conclusion of unitary status, noted that Petitioners' failure to object to racial enrollments until 1994 "indicate[d] that there were no perceived violations of the 1971 Order." Pet. App. 125a.

In 1994, Petitioners filed an Amended Motion to Enforce Court Order and Consent Order and for Further Relief, in which they alleged for the first time that Respondents were violating the District Court's original desegregation plan and the consent order by operating schools with majority or near-majority African-American populations. Pet. App. 70a. In the motion, Petitioners pointed to sixteen specific schools with student populations in which African-Americans comprised at least 40% of the whole. Pet. App. 70a-71a. None of these schools had ever been a majority black school at any time prior to, or at the time of, the implementation of the 1971 plan. Each was predominantly "white" in 1971, and "immediately after the 1971 plan was implemented [became] racially balanced." *Id.*, Pet. App. 15a-16a.[2]

The District Court designated a Magistrate Judge to hear Petitioners' motion. The Magistrate Judge conducted bench a trial and on June 23, 1995, issued a report and recommendation in which she recommended denial of the motion "because there have been no violations of the Court's

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[2]As the District Court specifically found, the number of Respondents' racially imbalanced schools is "relatively small." Pet. App. 130a. At the time that the motion to enforce was filed, Respondents operated 149 schools. Pet. App. 70a.

orders." Pet. App. 312a.

On November 17, 1995, the District Court deferred ruling on the report and recommendation, citing the need to make a "full fledged determination of whether [Respondents have] in fact achieved unitary status," but making no comment on the Magistrate's conclusion that there had been no violation of the Court's orders. Pet. App. 71a. The District Court referred the determination of unitary status to the same Magistrate Judge who had recommended a finding that Respondents had not violated the 1971 plan or consent order. The Magistrate Judge held a second trial and on August 26, 1997, issued a second report and recommendation, which recommended a finding of unitary status. Pet. App. 188a-314a.

On October 26, 1998, the District Court entered an order in which it rejected the Magistrate's recommended finding of unitary status at the same time it accepted virtually all of the Magistrate's subsidiary and other findings. Pet. App. 57a-187a. The District Court ruled the 1994 amended motion to enforce to be moot. Pet. App. 187a. Respondents filed a Motion to Alter or Amend Judgement. On December 4, 1998, the District Court denied that motion insofar as it sought amendment or alteration, but granted it in part as a request for clarification. Pet. App. 42a-56a.

Respondents appealed both of the District Court's orders to the Eleventh Circuit Court of Appeals. A three judge panel of the Court issued its opinion on March 16, 2001, in which it reversed the District Court and remanded the case with instructions that Respondents be released from court supervision. Petitioners did not seek rehearing. Neither did they seek to stay the Court of Appeals' judgment. On April 26, 2001, the District Court therefore entered

judgment in accordance with the Eleventh Circuit's mandate, and terminated its supervision of Hillsborough County schools.

ARGUMENT

Petitioners present three arguments for the granting of their petition. Respondents will answer each in the order originally presented.

I. The Decision of the Court of Appeals Does Not Conflict With This Court's Decisions or Those of Other Circuits and it Does Not Improperly Shift the Burden of Proof on Unitary Status Issues to Plaintiffs.

Petitioners misstate the holding for which review is sought. The specific, express, and narrow holding of the Court of Appeals was that the District Court applied an incorrect legal standard to the record before it, and its reliance on that standard "tainted and infected" its ultimate conclusion that Respondents had not attained unitary status as well as certain, specified subsidiary findings. Pet. App. 40a-41a.

Petitioners do not even address the Court of Appeals' holding, much less challenge its correctness. Indeed, they cannot, given the irrefutable fact that the District Court based its analysis and holding on the Eleventh Circuit's decision in *Lockett v. Board of Education of Muscogee County*, 92 F.3d 1092 (11th Cir. 1996) ("*Lockett I*"). In its opinion, the District Court expressly acknowledged that this opinion had been vacated, by the same panel which decided it, in *Lockett v. Board of Education of Muscogee County*, 111 F.3d 839 (11th Cir. 1997) ("*Lockett II*"), but explained that the withdrawn opinion "reiterated established principles of law which are applicable to the case at hand." Pet. App. 128a.

Petitioners do not contest the Court of Appeals' rejection of that rationale.

Neither do Petitioners challenge the Court of Appeals' description of the fatal impact of the District Court's erroneous reliance on *Lockett I*. They accept without objection the Court of Appeals' conclusion that the District Court incorrectly considered the Magistrate's report and recommendation, and assessed Respondents' conduct, under the standard that school districts seeking release from desegregation orders must show fulfillment with their obligations to "desegregate to the *maximum* extent practicable," when the proper measure, quoted in the petition itself, is whether "the vestiges of past discrimination [have been] eliminated 'to the *extent practicable*.'" Pet. App. 32a, emphasis in the original.

Petitioners cite *Lockett II*. They make no mention whatsoever of *Lockett I*, or the District Court's incorrect use of the vacated opinion. That omission, and Petitioners' failure to even acknowledge the actual holding at issue, are fatal to their argument of conflict, because Petitioners cite no opinion, of any court, with which the true holding of the Eleventh Circuit conflicts. Realizing this fact, Petitioners avoid what they cannot attack, attributing to the Court of Appeals a holding it did not pronounce and attempting to focus this Court's attention on a conflict which does not exist. Petitioners complain that the Eleventh Circuit engaged in nothing less than a "fundamental reallocation of the burden of proof in school desegregation cases." Pet. 9. There was no such reallocation. The Eleventh Circuit applied the correct law to the case at its hand. Its holding was informed by the application of that law, not on reallocation of the burden of proof, and there is no conflict between the Court of Appeals' ruling and the rulings of this or any other court.

Petitioners' arguments are constructed entirely upon dicta contained in the Court of Appeals' opinion. Petitioners mischaracterize these words as a holding that once a school district, placed under a court's supervision because of *de jure* racial segregation, demonstrates that demographics are a "substantial cause" of currently existing racial imbalances, the district no longer carries the ultimate burden of proving that the imbalances are not the product of past discrimination. The Court of Appeals made no such pronouncement, nor did it apply such a principle.

The Eleventh Circuit began its review of the District Court's ruling by enunciating the indisputably correct standard to be applied by courts assessing a school district's unitary status:

> [u]ntil unitary status is attained, the defendant school board has the burden of showing that any racial imbalance in the school system is not traceable, in a proximate way, to the prior *de jure* segregation. . . . Stated differently, once a plaintiff shows *de jure* discrimination (as [Petitioners] did here in 1962 . . .), a presumption arises that all racial imbalances in a school district are the result of the *de jure* segregation. To rebut this presumption, 'a school board must prove that the imbalances are not the result of present or past discrimination on its part.' (citing *Freeman*, 503 U.S. at 494; *Keyes v. School Dist. No. 1, Denver, Col.*, 413 U.S. 189, 208; *Swann*, 402 U.S. at 25; and *Lockett II*, 111 F.3d at 843). Pet. App. 30a.

This standard, with the presumption of causation

which is a part of it, was applied by the Court of Appeals, which found that Respondents had met it. Part of that holding was based on demographic evidence offered by Respondents. Petitioners do not challenge the findings both of the District Court and the Court of Appeals that Respondents proved that demographic change was a "substantial" cause of the racial imbalance of which Petitioners complain. They complain only that the evidence was insufficient to prove that demographics *alone* caused the offending imbalances.

Respondents were not required to prove that population shifts caused *all* of the racial imbalance identified by Petitioners. They had to show that the present imbalance was not a vestige of their past acts of *de jure* discrimination. That obligation included the task of overcoming a judicially imposed presumption in favor of causation. The Court of Appeals found that Respondents defeated the *presumption* that they *caused* the existing imbalances by presenting proof that demographics were a substantial cause of those imbalances. That finding did not relieve Respondents of their ultimate *burden* of proving that they did *not* cause the imbalances. The court of Appeals in fact applied that burden and found that Respondents had met it.

In reality, Petitioners do not seek the benefit of the established and unquestionably appropriate presumption described above, but rather want to impose on Respondents a different obligation, to rebut the non-existent presumption that demographic change, found or conceded by the Court of Appeals, the District Court, the Magistrate Judge, and Petitioners themselves (Pet. App. 17a), was the result of segregative school board action. It is only the imbalance that carries the benefit of a presumption. There is no concentric presumption that a non-segregative cause of the imbalance proffered by a school board to explain the imbalance is itself

a vestige of past illegality.

It was in response to Petitioners' arguments to the contrary, and in the specific context of demographic evidence proffered by Respondents, that the Court of Appeals wrote the dicta on which Petitioners' assertion of conflict solely depends:

> Where a defendant school board shows that demographic shifts are a substantial cause of the racial imbalances, the defendant has overcome the presumption of *de jure* segregation. Courts shall not assume that *demographic shifts* are a result of the past *de jure* segregation. Such an assumption is improper because 'it is simply not always the case that *demographic forces* causing *population change* bear any real and substantial relation to a *de jure* violation, and the law need not proceed on that premise. Lastly, a plaintiff does not undermine the strength of a defendant's *demographic evidence* by merely asserting that demographics *alone* do not explain the racial balance. Rather for a plaintiff to preserve the presumption of *de jure* segregation, the plaintiff must show that demographic shifts are the result of the prior *de jure* segregation or some other discriminatory conduct. Pet. App. 35a-36a (citations and footnote omitted, emphasis added).

The Court of Appeals' recitation of controlling legal principles is correct in every way. The language used, although attributed to *Lockett II*, has its origins in *Freeman*,

503 U.S. at 496-497, in which this Court instructed:

> The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied. It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation. And the law need not proceed on that presumption. As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system.

In order to dispel the presumption of causation applied to racial imbalances within its schools, Respondents were not limited to the use of demographics. Instead they were required to show, as Petitioners correctly observe, "that this segregated schooling is not also the result of *intentionally* segregative acts." Pet. 9, (citing *Keyes*, 413 U.S. at 208, emphasis added). Respondents could use demographics to meet this burden. But they could also make use of other proof, and they did.

Respondents proved, and the District Court found, that the 16 schools (of the 150 operated by Respondents in the 1995-1996 school year, Pet. App. 15a) of whose racial imbalance Petitioners complained had never had African-American majorities in their student populations prior to implementation of the 1971 desegregation plan, had in fact been "white" schools before that year, and were racially balanced immediately upon the plan's implementation.

Respondents proved, as the District Court found, that they took no action to change the boundaries of any of these schools, or any other action, to intentionally cause, or to exacerbate, the race ratios of those schools' student populations. App. 125a, 129a. Respondents proved that they effected no boundary change, nor did they construct, close, or reconfigure any school, or otherwise alter school attendance patterns, without prior notice to Petitioners and the Court, and the District Court took no action to disapprove the proposed changes or alter race ratios, save for its orders of 1975, requiring a supplemental plan, and 1990, sustaining Petitioners' objection to the establishment of a magnet program to Blake.

To all of this proof Respondents added unrebutted evidence that there had been significant and substantial shifts in racial demography, not in Hillsborough County as a whole, but within the relevant neighborhoods which populated the schools in question.[3] To this record, the Magistrate and the Court of Appeals, but not the District Court, applied the proper legal standard and found it had been met.

Petitioners do not attack that narrow holding of the Eleventh Circuit, which focused on the District Court's use of an erroneous legal standard. They instead contend, erroneously, that the Court of Appeals assigned to Petitioners a burden which should have been borne by Respondents, and

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[3]As the Magistrate found, and no one challenges, from 1970 until 1990 (the latter being the year of the most current census data available at the time of hearing), the number of Hillsborough County census tracts having populations with 25% to 50% black residents more than doubled, while tracts with 50% or more blacks have increased by 40%. Pet. App. 205a.

that this "reallocation" conflicts with the holdings of this Court and two other Courts of Appeals. There was no reallocation.

Petitioners assertions of conflict between the Court of Appeals and this Court's holdings rely on cases which do not address the issue Petitioners argue. Petitioners cite *Board of Education v. Dowell*, 498 U.S. 237 (1991), for the proposition that before a court releases a formerly segregated school system from its oversight, it must determine that, to the extent that demographics account for any racial imbalance, the "change is 'not attributable to the former *de jure* regime or any later actions by school officials.'" Pet. 10. This Court did not establish a presumption that it was. The Court of Appeals did not free Respondents of the burden enunciated in *Dowell*, or impose a contrary burden on Petitioners. The District Court did not find, and Petitioners do not assert, that actions taken by Respondents caused any of the demographic changes proven to have occurred.

There is no conflict between the Court of Appeals' holding and *Dowell*. The recognition of the presumption argued by Petitioners *would* create conflict, with this Court's holding in *Freeman*, 503 U.S. at 496-497, discussed above. The Court of Appeals' actual holding does not.[4]

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[4] Neither does the Court of Appeals' comment that a plaintiff does not "undermine" a defendant school board's demographic evidence by contending that the proof does not explain all of the imbalance at issue demonstrate a reallocation of the burden of proof. It is simply a comment on the insufficiency of the evidence offered by Petitioners, through their expert witness, which could have no intended purpose other than to "undermine" Respondent's offer of proof. It in no way suggests that Petitioners had an obligation to rebut, much less to prove.

Neither does the language of *Swann,* 402 U.S. at 21, quoted at page 11 of the petition, demonstrate conflict. That language speaks to the need for district courts overseeing school desegregation to monitor school construction and closings. The District Court's own 1971 order included the express direction that "all school construction, school consolidation and site selection . . . shall be done in a manner which will prevent the recurrence of the dual school structure." Resp. App.69b. The District Court did monitor compliance. From the date of its 1971 desegregation order to the present Respondents have not constructed, closed, consolidated, or reconfigured any school without first informing the District Court and Petitioners of their intentions.

When Respondents sought to establish a magnet program at Blake Junior High School to reduce the percentage of African-American students at that school, and Petitioners objected, the District Court prevented Respondents from proceeding. As the Court of Appeals noted, this ruling delayed the implementation of Respondents' magnet school program, the scope of which the District Court later found inadequate. Pet. App. 22a.

There has been no finding by the District Court that Respondents did not meet their obligations in the areas of school construction, or school openings and closings. Indeed, in denying unitary status, the District Court expressly found that Petitioners' "opening and closing of schools has generally maintained or improved racial balance" and disavowed any inclination to become further involved in school siting and construction issues. Pet. App. 173a-174a. In its earlier orders, the District Court had required approval of school site locations. Resp. App. 88b.

Petitioners' remaining arguments alleging conflict with this Court's opinions rely upon the concurring opinion authored by Justice Blackmun in *Freeman*, 503 U.S. at 513, not the law pronounced in the majority opinion. Even at that, Petitioners provide no evidence of conflict. The words cited speak to the need to determine that school board actions did not create or contribute to demographic imbalance. They do not impose a presumption that they did.

Neither does the Eleventh Circuit's opinion conflict with those of the Tenth Circuit in *Brown v. Board of Educ.*, 978 F.2d 585 (10th 1992) and *Dowell v. Board. of Educ.*, 8 F.3d 1501 (10th Cir. 1994). *Brown* merely affirms the burden on school districts to demonstrate "the absence of a causal connection between any current condition of segregation and the prior system." 978 F.2d. at 590. The Eleventh Circuit properly enforced that same burden here. Petitioners assert that, under the Tenth Circuit's "approach," a school system cannot meet its burden through demographic evidence "unless the current racial imbalance is 'only a product of demographic changes outside the school district's control.'" Pet. 14-15. In fact, and as the complete portion of the dicta from which Petitioners take only a part makes clear, the fundamental determination to be made is whether the more condition of imbalance is a vestige of the former system. *Brown*, 978 F.2d at 591. *Brown* does not make use of a presumption that a desegregated school system caused the demographics.

Indeed, *Brown* demonstrates the correctness of the Eleventh Circuit's holding, and its consistency with controlling law. In rejecting the district court's opinion at issue in *Brown*, the Tenth Circuit wrote:

> In the present case, the district court did state: 'Demographic forces, uncontrolled by

> defendants form the racial composition of the schools.' This comment, however, is in considerable tension with the district court's observations that demographics have had a desegregative effect on student assignment.... Moreover, in light of the school district's failure to ever operate without racially identifiable schools, and the district court's failure to apply the appropriate legal standard, the court's conclusion that demographics caused segregation simply does not amount to a supportable holding that the current condition of segregation is wholly unconnected with the prior de jure school system. The absence of a moment when [the school system] achieved compliance with the Constitution is vital because it is only '[o]nce the racial *de jure* violation has been remedied [that] the school district is under no duty to remedy imbalance that is caused by demographic factors.' 978 F.2d. at 590, n.6.

Respondents not only operated without racially identifiable schools, at the District Court's instruction they did so after closing all schools which had been used to segregate African-American students. Even as it denied unitary status, the District Court found that "a race neutral attendance pattern was implemented in the case at hand," and noted that Respondents did desegregate their system. Pet. App. 125a-126a, 62a. Demographics in Hillsborough County were *not* desegregative in regard to the schools being examined, and the District Court so found. The Tenth Circuit found in *Brown* that the district court opinion which it reviewed was "in considerable tension" with the record on which the opinion had to be based, and the lower court used an incorrect legal

standard. So too did the Eleventh Circuit in the case before it.

Petitioners' use of the Tenth Circuit's opinion in *Dowell* is also unavailing. They write in their petition that the Tenth Circuit requires a showing that "the school system did not play a role in, or contribute *in any way* to, the demographic change. Pet. 14, citing *Dowell*, 8 F.3d at 1511, n.6, emphasis added. In fact, what the Tenth Circuit, relying on the concurring opinions in *Freeman*, required, at the cited part of its holding, was a showing by the board that "its own policies did not contribute *directly* to the racial imbalance of the schools." *Id.* emphasis added. And it did so after quoting the principle that "[The fact t]hat there was racial imbalance in student attendance zones was not tantamount to a showing that the school district was in noncompliance with the decree or its duties under the law." *Dowell*, 8 F.3d at 1511 (citing to *Freeman,* 503 U.S. at 494).

Neither does the Eleventh Circuit's holding conflict with the holding of *Jenkins v. Missouri*, 122 F.3d 588 (8th Cir. 1997). The Eighth Circuit upheld the district court's determination that the school board had failed to demonstrate that prior inequities in student achievement caused by *de jure* segregation had been remedied and it therefore bore the onus of the presumption that its actions had caused the current conditions. As in *Brown,* the court in *Jenkins* dealt with a system unlike Respondents.' In this case, at the District Court's direction, the racially segregated patterns of student assignment were abolished once and for all in 1971. Moreover, in *Jenkins*, the Eighth Circuit noted that the district court's finding was supported by the fact that the school district's expert was unable to explain a third of the gap that existed between black and white student achievements. There was no unexplained gap in this case.

The same expert who testified in *Jenkins* testified in this case, and he opined without qualification that demographics *did* cause the racial imbalances that existed in Respondents' schools, and that *none* of these imbalances was caused by Respondents' actions. Pet. App. 120a. This conclusion was shared by Respondents' demographic expert. Petitioners met that proof by providing their own witness, who could say only that the work of Respondents' demographer was "very good" but did not allow *him* to attribute *all* of the imbalances to demographics. App. He did not identify the gap between Respondents' expert's data and "all." He did not testify that it was substantial.

Petitioners do not contend that the remaining cases they cite conflict with the Eleventh Circuit's holding, only that they do not support it. Pet. 15, n.15. The cases therefore provide no support for the granting of the writ. Petitioners have not in any way addressed the actual holding of the Court of Appeals. They have not shown any conflict between that holding and that of any other Court.

II. The Court of Appeals' Interpretation of the Good-faith Standard Does Not Conflict With the Framework Established by this Court's Decisions in *Freeman* and *Dowell* and with the Tenth Circuit's Interpretation.

Petitioners complain that the Court of Appeals failed to apply the proper legal standard in reversing the District Court's finding that Respondents did not demonstrate good faith sufficient to warrant a finding of unitary status. Specifically, Petitioners, relying on the Tenth Circuit's opinion in *Dowell*, 8 F.3d 1501, complain that the Court of Appeals did not require Respondents to show "future-oriented board policies manifesting a continued commitment to desegregation." Pet. 21, citing *Dowell*, 8 F.3d at 1513. This

argument is new to Petitioners' litigation strategy, appearing for the first time in their petition.

In her report and recommendation, the Magistrate Judge specifically found that Respondents had demonstrated good faith sufficient to support a finding of unitary status. Pet. App. 265a-266a. The Magistrate reached that conclusion by applying the standard enunciated in *Freeman*, 503 U.S. at 498, on which Petitioners now rely. In the exceptions they filed to the Magistrate's report and recommendations, Petitioners did not raise the contention now argued in support of the petition, contending only that Respondents had not shown past compliance with the District orders. Resp. App. 112b-113b. They did not argue the lack of "future-oriented" policies, nor did they challenge the Magistrate's finding of Respondents' future intentions. The District Court treated the issue of Respondents' good faith only as it related to past compliance with its orders. While it rejected the Magistrate's finding of good faith, the District Court did not criticize the Magistrate's focus, or reject her determination, based on testimony from Respondents' Superintendent and most School Board members which she, but not the District Court had observed, that Respondents had "accepted the principle of racial equality and will not revert back to a dual system." Pet. App. 265a-266a.

The Court of Appeals reversed the District Court based on its uncontested conclusion that the District Court applied an incorrect standard of law which infected and tainted the District Court's determinations. Once the Court of Appeals rejected the District Court's finding that Respondents had not fulfilled all of their court imposed obligations, the District Court's ultimate conclusion of a lack of good faith, which depended entirely on past noncompliance, could not be sustained. Petitioners make no complaint as to these findings.

The Tenth, Eleventh, and all other Circuit Courts of Appeals look to the post-desegregation order past to predict a school board's future compliance with the Constitution. Both are bound by the reality that compliance with a desegregation order can be assessed only with reference to that order, which must include a "precise statement" of the district's obligations. *Missouri v. Jenkins*, 515 U.S. 70, 101 (1995). Here the Eleventh Circuit applied the proper law to the record created by the parties and the District Court. It committed no error in doing so.

III. The Court of Appeals Did Not Misapply Governing Law in its Review of the District Court's Factual Findings.

Petitioners' last contention is that the Court of Appeals subjected the District Court's findings to "more stringent scrutiny" because the trials which produced the record on which it made those findings were conducted by the Magistrate Judge. They contend that this heightened analysis deprived Petitioners of the benefit of the clearly erroneous standard, which should have been used to review the findings in question. Once again, Petitioners misstate the true holding of the Court of Appeals. The Court held that the District Court's findings were "tainted and infected" by its use of an incorrect legal standard. For that dispositive reason, the Court of Appeals rejected the District Court's findings made after that misinformed analysis.

> If the district court had applied *Lockett II*, rather than *Lockett II*, her findings of fact would have led her to the same conclusion as the magistrate judge with respect to student assignments. Pet. App. 36a.

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> Additionally, we are persuaded that, if the district judge had followed *Lockett II*, she would have concluded that [Respondents] have acted in good faith. Pet. App. 38a.

Petitioners' final point turns on the fact that the Court of Appeals noted in dicta that its conclusion of District Court error on the issue of good faith were "buttressed" by two points. Pet. App. 39a-40a. These were the District Court's discussion of the extent of Respondents' use of a majority-to-minority transfer policy, and the fact that because a judicial determination of good faith "is in some respects subjective," deference should have been paid to the Magistrate's finding of it. *Id*. Tellingly, Petitioners do not complain about the Court of Appeals' discussion of the former. They accept, as did the District Court based on Petitioners' expert's testimony, that Respondents' more aggressive use of their majority-to-minority policy would have had no significant effect on the student populations of the schools at issue before it. Petitioners take issue with the Court of Appeals findings in the areas of statistical demographic evidence and good faith. However, the Court of Appeals spoke of deference to the Magistrate's findings only in the context of the latter, and then only as support for a conclusion reached on other grounds. The Court did not, as Petitioners incorrectly assert at Pet. 25, find the Magistrate's resolution of credibility "dispositive."

The Court of Appeals' holding did not depend on any determination that the Magistrate's findings were entitled to more weight than they were due, or the Magistrate's resolutions of credibility. It found only that having applied the proper standard of law, the Magistrate's conclusions were correct, while the District Court's, because they were guided by the wrong law, were not.

The Court of Appeals did not ignore the clearly erroneous doctrine. It expressly noted that the application of an incorrect legal principles requires an exception to the appellate principle requiring the demonstration of clear error before overturing a trial court's findings of fact. Pet. App. 26a-27a. Petitioners do not challenge this statement of law, or the Court of Appeals' determinations based on it. They sidestep again, relying on more dicta in the Court of Appeals' opinion to reargue the Court of Appeals subsidiary findings.

The District Court noted, despite its findings of a lack of good faith, that Respondents had only a "short road to travel" to unitary status. App. 185a. It expressly found that Respondents had been "relatively successful in implementing desegregative techniques. App. 130a. And it concluded that, "[u]ndoubtedly, [Respondents] have been effective in desegregating [their] system." App. 93a. To hold, as the Court did, that Respondents nevertheless could not be declared unitary, because they did not take unspecified additional steps, was error.

In fact, and as the Court of Appeals found, Respondents' demographics data were reliable, and the District court used them as a basis for its finding, stated several times in its opinion, that demographics were a "substantial cause of racial identifiability" in Respondents' schools. Pet. App. 108a. The District Court, using that data, expressly found it "probable that these few [schools contested by Petitioners] would have become racially imbalanced regardless of [Respondents'] efforts." Pet. App. 110a. It found, using the same data, that the schools which were racially imbalanced were all located in the vicinity of other schools with high black enrolments and making adjustments to the attendance zones for the purpose of improving balance, "would be the expense of neighboring schools which are on

the verge of becoming racially identifiable." Pet. App. 96a, 120a. It accepted the opinion of Respondents' expert, using the same data, that "shifts in the inner-city population made it very difficult to adjust attendance boundaries to maintain [racial balance]." Pet. App. 95a.[5]

Moreover, the District Court's stated concerns with the demographic data were that they included more potential students than would be attending the various schools in question and reflected black percentages less than those reflected in actual school attendance. The concerns are not material. The District Court found that the imbalanced schools being addressed served attendance areas which were largely unchanged for long periods of time. Pet. App. 88a-93a. No African-American students were brought to these schools from outside the attendance areas. Pet. App. 209a. Thus it was undisputed that each and every student attending any of the schools in question lived in its attendance zone, regardless of whether he or she was accurately recorded by census takers. And the unquestioned thrust of the report authored by Respondents' expert was that Hillsborough County experienced dramatic black population growth in several of its geographical distinct parts. This thesis was not challenged by Petitioners, and was accepted by the District Court, based on the only data offered at trial.

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[5]The District Court also noted that Petitioners' expert conceded that redrawing boundaries to improve racial balance at one school could worsen it at others. Pet. App. 120a. While the expert also opined that Hillsborough County was not highly segregated and, therefore, redrawing boundaries remained a viable option, the District Court noted that this last opinion was reached based on consideration of only five schools. Pet. App. 120a-121a.

To all of this must be added that facts that the District Court, in 1971, specifically rejected the concept of transporting large numbers of white students to attain racial balance, because of concern for "flight," that this concept was confirmed in 1998 by the same Court, writing that "bus[ing] children across the county to ensure racial compositions that comport with the county-wide ratios . . . would not be practicable and was not required by the Court's 1971 Order . . . the constitution or governing law," the express finding that Respondents' school openings and closings "generally maintained or improved racial balance" (Pet. App.173a), and the findings that "[Respondents] have not "affirmatively exacerbated racial imbalances. . . ." (Pet. App. 129a), and "[t]here is no indication that the racial identity of [Respondents'] schools has been deliberately caused by segregative policies or practices by [Respondents] (Pet. App. 125a)." In short, Respondents proved all that was required of them to demonstrate unitary status, and the Court of Appeals properly so found.

CONCLUSION

The holding of the Eleventh Circuit in this case was that the District Court applied the incorrect legal standard to the record before it, and that error infected and tainted its ultimate conclusion to a point that reversal was required. Petitioners do not challenge that holding. Their attempts to raise issues and matters not decided by the Court of Appeals does not warrant a grant of certiorari.

Respectfully submitted,

W. Crosby Few
Few & Ayala
109 North Brush Street
Suite 201
Tampa, Florida 33602
813-229-6401

Thomas M. Gonzalez
Counsel of Record
Thompson, Sizemore
& Gonzalez, P.A.
109 North Brush Street
Suite 200
Tampa, Florida 33602
813-273-0050

APPENDIX 1

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
TAMPA DIVISION

[Filed December 10, 1958]

Civil Action No. 3554
Julian A. Blake, Clerk

ANDREW L. MANNING, a "minor, by his father and next Friend, WILLIE M. MANNINGS; SHAYRON B. REED and SANDRA E. REED, minors, by their father and next friend, SANDERS B. REED; NATHANIEL CANNON, NORMAN THOMAS CANNON, TYRONE CANNON and DARNEL CANNON, minors, by their father and next friend, NATHANIEL CANNON, SR.; and GAIL RENE MYERS, a minor, by her father and next friend, RANDOLPH MYERS, Plaintiffs,

v.

THE BOARD OF PUBLIC INSTRUCTION OF

HILLSBOROUGH COUNTY, FLORIDA and CLYDE McLEOD, AL CHIARAMONTE, JOHN COLEMAN and MARVIN GREEN, Members of the Board of Public Instruction of Hillsborough County, Florida and J. CROCKETT FARNELL, Superintendent of Public Instruction in Hillsborough County, Florida, Defendant.

COMPLAINT

Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to title 28, United States Code, §1343(3), this being an action which is authorized by law, Title 42, United States Code, §1983, to be commenced by any citizen of the United States to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Constitution and laws of the United States. The rights here sought to be redressed are rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and by Title 42, United States Code, §1981.

Type of Proceeding

2. This is a proceeding for a permanent injunction enjoining the defendants herein from continuing to pursue their policy, custom and usage of operating the public schools of Hillsborough County, Florida on a racially segregated basis, in violation of rights secured to the plaintiffs by the due

process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and by Title 42, United States Code, §1981.

3. This proceeding is brought es a class action by the plaintiffs on behalf of themselves and on behalf of other persons similarly situated, pursuant to the provisions of Rule 23(a)(3) of the Federal Rules of Civil Procedure, The plaintiffs and the members of the class which they represent are minor Negro children and their parents, who are citizens of the United States and of the State of Florida, residing in the City of Tampa, Florae All of the minor children are eligible to attend the publi. elementary schools maintained and operated by defendants. The minor children are all similarly effected by the policy of the defendants which is attacked in this complaint in that all the minor plaintiffs are required to attend public elementary schools which are maintained and operated by defendants for Negro children exclusively and are denied the right to attend certain other schools which are more conveniently located for them solely because of their race and color. The persons which constitute this class are so numerous as to make it impracticable to bring each member of the class before the court, but there are common questions of law and fact involved affecting the several rights of the members of the class and a common relief is sought for all of the members of the class. The minor plaintiffs and their adult parents adequately represent the class.

4. The plaintiffs in this case are Andrew L. Mannings, a minor, by his father and next friend, Willie M. Mannings; Shayron B. Reed and Sandra E. Reed, minors, by their father and next friend, Sanders B. Reed; Nathaniel Cannon, Norman Thomas Cannon, Tyrone Cannon and Darnel Cannon,

minors, by their father and next friend, Nathaniel Cannon, Sr.; and Gail Rene Myers, a minor, by her father and next friend, Randolph Myers. The minor plaintiffs and their fathers are Negro citizens of the United States and of the State of Florida, residing in the City of Tampa, Florida, which is located in Hillsborough County, Florida. Each minor plaintiff is eligible under the laws of the State of Florida to attend the public elementary schools operated by he defendants in this case. Each minor plaintiff, with the exception of one, Gail Rene Myers, is presently enrolled in a Negro elementary school under the jurisdiction, management and control of defendants. Gail Rene Myers will be eligible to enroll in school for the first time in September 1959.

Defendants

5. The defendants in this case are The Board of Public Instruction of Hillsborough County, Florida and Clyde McLeod, Al Chiaramonte, John Coleman and Marvin Greene, members of The Board of Public Instruction of Hillsborough, County, Florida and J. Crockett Farnell, Superintendent of Public Instruction of Hillsborough County, Florida. The Board of Public Instruction maintains and operates the public school system of Hillsborough County, Florida, pursuant to the laws of the State of Florida. The defendant J. Crockett Farnell is the Superintendent of Public Instruction of Hillsborough County, Florida and, as such is the chief administrative officer of the Board of Public Instruction of Hillsborough County, Florida. The individual members of the Board of Public Instruction of Hillsborough County, Florida, determine the policies of the Board.

Policy Of Which The Plaintiffs Complain

6. The plaintiffs herein allege that the defendants, acting under color of the authority vested in them by the laws of the State of Florida, have pursued and are presently pursuing a policy of operating the public school system of Hillsborough County, Florida on a racially segregated basis. Pursuant to this policy, 72 of the public schools of Hillsborough County are limited to attendance by white students only and 18 schools are limited to attendance by Negro students. Pursuant to this policy, many Negro students, including some of the minor plaintiffs, who reside nearer to schools limited to white students are required to attend schools limited to Negro students which are considerably removed from the places of their residences. In some instances, some of the minor plaintiffs and other minor Negroes similarly situated are required to travel as much as ten miles to attend a Negro elementary school, whereas they reside only two blocks from a white elementary school.

Defendants' Refusal to Change the Policy

7. On or about August 16, 1955, the defendants were formally petitioned by Negro parents of children eligible to attend the public schools of Hillsborough County, Florida, to abolish the segregation policy complained of herein. This formal, petition was followed by several letters on behalf of the Negro parents requesting defendants to desegregate the public schools of Hillsborough County, Florida. Despite this petition and despite the several letters directed to the defendants, the defendants have refused to discontinue the policy of operating the public schools of Hillsborough County, Florida on a racially segregated basis. Defendants'

refusal to change the policy of operating the public schools of Hillsborough County on a racially segregated basis operates to prevent the plaintiffs from being assigned to white schools nearer to their places of residence which they would attend if they were white and which they presently desire to attend.

Irreparable Injury

8. As a result of the refusal of the defendants herein to discontinue the policy of operating the public school system of Hillsborough County, Florida, on a racially segregated basis, the minor plaintiffs herein and the other minor Negro children similarly situated, have suffered and shall continue to suffer injury which is irreparable to them. It is, therefore, necessary for this court to issue an injunction enjoining the segregation policy in order that this irreparable injury to minor plaintiffs herein shall cease. The plaintiffs have no other speedy or adequate remedy at law to redress the injury complained of herein.

WHEREFORE, plaintiffs respectfully pray that this court advance this cause on the docket and order a speedy hearing of this case and that after such hearing this court enter a permanent injunction forever restraining and enjoining the defendants, their agents, employees, attorneys and successors and all persons in active concert and participation with them, from continuing to pursue the policy of operating the public schools of Hillsborough County, Florida on a racially segregated basis and enjoining them from refusing to permit the minor plaintiffs, and other minor Negro children similarly situated, to attend schools nearer their places of residence solely because of the race and color of said minor plaintiffs.

Plaintiffs pray that this court will allow them their costs herein and grant them such other, additional, or alternative relief as may appear, to the court to be equitable and just.

Francisco A. Rodriguea
703 Harrison/Street
Tampa 2, Florida

Constance Baker Motley
Thurgood Marshall
10 Columbus Circle
New York 19, N. Y.

Attorneys for Plaintiffs

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

*No. 3554 Civ. T
Wesley R. Thies, Clerk

[Filed May 11, 1971]

ANDREW L. MANNINGS., et al,)
Plaintiffs,)
)
vs.)
)
THE BOARD OF PUBLIC)
INSTRUCTION OF)
HILLSBOROUGH)
COUNTY, FLORIDA, et al)
Defendants)
)

OPINION AND ORDER

This is a school desegregation case. Named as defendants are the Board of Public Instruction of Hillsborough County, Florida, the members of the Board, and the

Superintendent of Public Instruction of Hillsborough County.[1] Hereinafter they will be referred to as "defendants" or "school board."

Since 1954 it has been clear that segregated schools are illegal and that school boards and the courts, if necessary, have a duty to take affirmative action to desegregate them.

On April 20, 1971, it became and is crystal clear that affirmative action ordered by this and other courts for that and consistently opposed by certain of the defendants, is legal.

To obviate any doubt that there is and has been state-compelled segregated schools in Hillsborough County, which this Court and others have previously found and again so finds, this opinion and order will necessarily be in some detail.

Some of this may not be known by some or all members of the present board, although it should be. To be sure that they do know, a copy of this Order and a copy of the

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[1] Since the institution of this action the boards of public instruction have been renamed school boards. Art.9 § 4(a), Fla. Const. 1968; Chapter 69-300, Laws of Florida 1969; Section 230.21, Florida Statutes 1970. County superintendents of public instruction have been renamed superintendents of schools. Art.9 § 5, Fla. Const. 1968; Chapter 69-300, Laws of Florida 1969; Section 230.321, Florida Statutes 1970.

Under the provisions of Rule 25(d), F.R.Civ. P. the School Board of Hillsborough County, the present members of the School Board, and the incumbent Superintendent of Schools of Hillsborough County are now the defendants in this action as the successors in office of the 1958 defendants.

April 20, 1971, Supreme Court Opinion in Swann v. Charlotte-Mecklenburg Board of Education, _____ U.S. _____, 39 U.S.L.W. 4437 (1971) will be sent separately to each defendant. It is assumed that being informed each will fulfill his or her sworn obligation to "support and defend the Constitution of the United States," as did the Court. Each should remember that he is a defendant, and that the Court will uphold its obligation.

On April 14, 1971, the Court received a letter from the Superintendent of Schools of Hillsborough County, Dr. Raymond O. Shelton. Part of the letter reads:

> In response to a delegation of parents representing the Gorrie and Carver Elementary Schools in Tampa, the Hillsborough County Board of Public Instruction has directed that I inform the Court of the Board's desire to "unpair" schools in this County. It is the strong feeling of the parents from Gorrie and Carver Schools, a feeling in which the Board concurs, that education in the paired schools is deteriorating rather than improving.* * *
>
> The parents have documented many short comings in these schools which they attributed to pairing and are very concerned about the damage that is being done to children and also the damage that is being done to the public school system by "white flight".

The Court's most recent attempt to persuade and then require defendants to operate their school system in

conformity with the United States Constitution occurred in August 1970. At that time several orders were issued calling for the desegregation of various schools in Hillsborough County during the 1970-1971 school year. Since August 1970 important changes in law and fact affecting this case have supervened.

The school board filed a report in November 1970 which clearly indicated that the Court's desegregation orders were not having the intended effect of abolishing the dual system of schools in Hillsborough County. Second, the Court of Appeals for the Fifth Circuit handed down a string of opinions with respect to the disestablishment of segregated.school systems. Finally, on April 20, 1971, the Supreme Court of the United States in four 9-0 decisions set forth with clarity and precision the responsibilities of district courts and school boards in achieving an end to state-compelled school segregation.

A federal court is bound to consider any change, either in law or fact, which has supervened and affects a prior judgment. Bell v. Maryland, 378 U.S.226 (1964); Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211 (5 Cir.1969) . The Ccurt will therefore re-examine the status of the Hillsborough County School System from the standpoint of all essentials required to convert a dual school system into a unitary one.[2]

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[2] The Court will concern itself principally with only one of the six essential elements which go to disestablish a dual system--student assignment.

HISTORY OF THE CASE

I

This action was begun in December 1958, over 12 years ago.[3] It is the oldest case on the active docket of the Court.[4]

The original complaint, filed December 10, 1958, alleged in part:

> * * * the defendants, acting under color of the authority vested in them by the law of the State of Florida, have pursued and are presently pursuing a policy of operating the public school system of Hillsborough County, Florida, on a racially segregased basis. Pursuant to this policy, 72 of the public schools of Hillsborough County are limited to attendance by white students only and 18 schools are limited to attendance by Negro students. Pursuant to this policy, many Negro students including some of the minor plaintiffs, who reside nearer to schools limited to white

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[3] At the time this suit was instituted counsel for plaintiffs included Thurgood Marshall, an Associate Justice of the Supreme Court since 1967, and Constance Baker Motley, a District Judge in the Southern District of New York since 1966.

[4] The papers filed in this case, including pleadings, motions, exhibits, depositions, orders, and so forth, now weigh a total of 62-1/2 pounds and, when stacked on top of each other, rise 2 feet, 3 inches off the ground.

> students are required to attend schools limited to Negro students which are considerably removed from the places of their residences. In some instances, some of the minor plaintiffs and other minor Negroes similarly situated are required to travel as much as ten miles to attend a Negro elementary school, whereas they reside only two blocks from a white elementary school.[5] [Emphasis supplied.]

The complaint was dismissed by a judge of the Southern District of Florida, now retired, on August 7, 1959, on the ground that plaintiffs had not exhausted their administrative remedies available under the Florida Pupil Assignment Law. Section 230.232, Florida Statutes. [6]Plaintiffs appealed, and on April 13, 1960, the Court of Appeals reversed. Mannings v. Board of Public Instruction of Hillsborough County, 277 F. 2d 370 (5 Cir.1960) (hereafter Mannings I).

The Court of Appeals held:

> The Board seems to proceed on the assumption that the presence of the Assignment laws on the statute books legally excludes the possibility of the Board's continuing a policy of racial segregation in the

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[5] Complaint, filed December 10, 1958. p.4

[6] Judge George Whitehurst. Hillsborough County was in the Southern District of Florida until October 28, 1962, when the Middle District of Florida was created. See Pub. L. 87-562, 76 Stat. 247, now codified in 28 U.S.C. § 89.

> county schools. It follows, it says, that injunctive relief would be inappropriate. This, of course, does not follow. Mannings I, 277 F.2d at 373.

After referring to "[t]he failure of appellee [i.e., the school board] to show any disposition to abandon the segregation policy, long pursued, and, since 1954, known to be illegal," the Court of Appeals declared:

> We conclude that, without being required to make application for assignment to a particular school, the individual appellants, both for themselves and for the class which they represent, are entitled to have the trial court hear their evidence and pass on their contention that the pupil assignment plan has not brought an end to the previously existing policy of racial segregation. In the event proof of this fact is made appellants would be entitled to their injunction as Mannings I, 277 F.2d at 375.

Subsequent to the reversal there were further proceedings in this case. Non-jury trial was held December 4-6, 1961, before another judge who has since been elevated to the Court of Appeals.[7]

On August 21, 1962, almost four years after the suit was commenced, Findings of Fact and Conclusions of Law

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[7] Judge Bryan Simpson

were entered. Based on the evidence the Court found as matters of fact:

> 6. Prior to 1954, the public schools of Hillsborough County were operated on a completely segregated basis, i.e., certain schools were maintained and operated for the exclusive attendance of Negro children and certain schools were maintained and operated for the exclusive attendance of white children. The Negro schools were staffed by Negro personnel and the white schools were staffed by white personnel.
>
> 7. Prior to September, 1961 there was no change in the racial composition of any Hillsborouyh County school. On that date one seven (7) year old Negro boy (not a plaintiff here) was admitted to Bayside School, a school for handicapped children in the county.* * *
>
> 12. At the time of trial there were approximately 80,000 children enrolled in the 114 public schools of Hillsborough County, 20 of which schools are Negro schools and 94 of which are white schools. There are approximately 3,500 teachers. Attendance zone lines are established for each of the elementary schools as required by Florida Law (Section 230.23 Fla. Stat.) School attendance area lines are revised each year for the purpose of utilizing each school to its capacity.

In numerous instances attendance area lines for white and Negro schools overlap requiring Negro students to travel a considerable distance to attend a racially segregated school, when schools limited to white students are located within close proximity to their residence. Some of the minor plaintiffs here attend a Negro elementary school ten (10) miles from their residence, whereas they reside within two of\r three blocks from a white school.

The junior and senior high schools are operating on the feeder system. This means that graduates of Negro elementary schools are customarily promoted to Negro junior high schools and in turn to Negro senior high schools, and that graduates of white elementary schools are promoted to white junior high schools and in turn to white senior high schools. Thus, the compulsory biracial system started with elementary school through separate attendance areas carries through the final grade of high school.

Plant City is a community of about 15,000 inhabitants near the eastern edge of Hillsborough County, with a white high school in the east end of that town and a Negro junior-senior high school in the west end of the town. There are Negro and white residential sections near each high school. However, Negro students from the east end of town cross

the town to attend the Negro school and white students from the west end of town cross the town to attend the white high school.[8]

This pattern of mixed residential areas close to school exists in a number of other sections of the county. In each instance racially segregated attendance is brought about by reason of separate, overlapping dual school zone lines for white and Negro schools. In addition to the Ybor City section, such neighborhood areas include Old Port Tampa and West Tampa.* * *

13. * * * [The Record] is a clear demonstration of the way in which the Florida Pupil Assignment Law, and the resolutions adopted by the defendant Board thereunder, has been used as an instrument to balk attempts at desegregation, and not as a means to accomplish desegregation. Few parents have the time and the patience to follow through to the unexpected success that Mr. Saunders achieved a year and a half after he started

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[8] At hearing on October 5, 1962, counsel for the school board asked the Court to amend its Findings so as to state that the evidence also indicated that many white students traveled considerable distances to attend white schools despite the existence of black schools closer to their homes. The request was denied since this is an action to vindicate the rights of black American citizens. Certainly however the record is clear that both whites and blacks have been obliged to attend schools not nearest their homes in order to perpetuate segregation.

> trying to enter his six year old child in the first grade of the elementary school nearest his home.
>
> 14. Whatever its merits in the abstract, the Florida Pupil Assignment Law, has been and is being discriminatorily and unconstitutionally applied by the defendant Board as a means of effectively resisting desegregation of the defendant school system. [Emphasis supplied]

Also on the basis of the evidence Judge Simpson concluded as a matter of law that:

> 1. On and prior to May 17, 1954, the public school system of Hillsborough County was operated on a compulsory biracial basis pursuant to the Constitution* * *and the laws of the State of Florida. * * * Separate schools were constructed, operated and maintained, staffed by white personnel for white pupils only. Separate schools for Negro pupils only were constructed, maintained and operated, staffed by Negro personnel.
>
> 2. Despite the United States Supreme Court decisions in Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (May 17, 1954) and 349 U.S.294 (May 31, 1955), and Cooper v. Aaron, 358 U.S.1 (September 29,1958) holding all state laws which either require or permit racial segregation in the public schools to be unconstitutional under the Fourteenth

Amendment, the defendants have continued to operate the Hillsborough County School System on a. racially segregated basis as a matter of custom, policy and usage. No steps have been taken by defendants to reorganize this biracial school system into a single, non-racial school system.* * *

4. The duty to initiate desegregation of the public school system of Hillsborough County, is cast upon the defendant school authorities under the decision in the instant case by the Court of Appeals for the Fifth Circuit.* * *

5. The existence of the Florida Pupil Assignment Law and the opportunity to apply thereunder for reassignment does not automatically and ipso facto relieve the defendants of their duty to operate the school system under their charge on a non-racial basis.* * *

The basic fault inherent in the present application of the criteria of the Pupil Assignment Law is tkat only after a Negro child has first been assigned to a segregated school, under the area attendance zone lines now in force, is he permitted to seek reassignment. * * *to remove discrimination, the initial assignment must not be based on racial grounds. * * *

> 6. The evidence shows that the Florida Pupil Assignment Law has been applied by these defendants in an unconstitutional manner to effect an unconstitutional result, that is to say, it has been applied so as to perpetuate and maintain racial segregation in the public schools of Hillsborough County, and it has been applied so as to defeat and evade in a racially discriminatory fashion, the attempts of parents of Negro children to transfer their children to previously all white schools. * * * in 1960 and 1961, when Negro parents sought reassignment of their children to white schools, the law was used to subject these pupils to investigation, tests, deliberations and determinations not applied to the application of white pupils seeking reassignment to white schools or to Negro pupils seeking reassignment to Negro schools.

In accordance with the Findings of Fact and Conclusions of Law of that date, an injunctive decree was issued on August 21, 1962. The decree found that the equities of the cause were with plaintiffs and permanently enjoined defendants and their successors in office from operating a racially discriminatory school system in Hillsborough County. The school board was given until October 30, 1962, to file a comprehensive plan of desegregation.

The plan, filed October 29, 1962, provided for integration of one grade a year, beginning with the first grade in the 19631964 school year. Under the plan the dual system of separate attendance areas for the first grade in each of the

schools wkere dual areas had theretofore existed would be abolished and a single attendance area was to be provided for attendance therein by first grade students located in such attendance area. Every child entering the first grade was to have the option of attending either (a) the school nearest his residence, or (b) the school nearest his residence wherein members of the child's race were numerically predominant. This arrangement was to be extended one grade a year each successive school year.[9]

Plaintiffs objected to the plan and submitted their own plan. It was their proposal that the school board draw up new attendance areas without regard to race for all its elementary schools, with elementary school children being required to attend the elementary school within their zone. The school board would be required by January 1, 1964, to submit a plan for desegregating all other grades.[10]

By order entered May 8, 1963, Judge Simpson approved the school board's plan with minor modifications. Judge Simpson wrote:

> To the extent that the injunctive features of the August 21, 1962 decree are not ordered immediately enforced herein, and in later orders of the Court, it is emphasized that deferment thereof is dictated by practical considerations and by the court's firm

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[9] Defendants' Plan, filed October 29, 1962.

[10] Plaintiffs' Proposed Plan of Desegregation, filed November 16, 1962.

> conviction that orderly step by step implementation of its August 21, 1962 decree is both beneficial and necessary.* * *
>
> Unmodified, the plan as submitted and herein approved would require twelve (12) years, on a grade a year basis, before complete desegregation of Hillsborough County schools would be accomplished. It is extremely doubtful that the present Board of Public Instruction or its successors in office will find it necessary or desirable to stretch the process out to the fall of 1974 (this year's entering first graders will at that time be rising high school seniors. The amendment of the plan so as to accelerate its grade a year provisions should be and will be a matter for recurring reconsideration by the Court, upon application of plaintiffs or defendants, or upon the Court's own motion.

Following the order of May 8, 1963, these proceedings continued with unabated vigor. Motions and pleadings were filed, additional discovery was undertaken, exhibits and reports were docketed, hearings were held, and orders were entered.

The school board expedited its plan for desegregation by one year for the 1965-1966 school year, so that the plan's provisions were applied to fourth, as well as first, second, and

third graders.[11] The plan was again expedited the following year: during the 1966-1967 school year it was applicable to all students in grades one through six.[12]

Upon Judge Simpson's appointment to the Court of Appeals the case was assigned to Judge Joseph P. Lieb in early 1967.

On May 15, 1967, Judge Lieb entered an Order on Motion for Further Relief which superseded the order of May S, 1963, and directed the implementation of a new plan of desegregation. Commencing with the 1967-1968 school year, a single system of non-racial attendance areas was to be established for all Hillsborough County schools. Each student was to be assigned to the school or schools in the attendance area of his residence. Where there was more than one school in such attendance area offering the same grade to which the student was eligible, he would have a "free choice" among such schools, and no choice was to be denied for any reason other than overcrowding.

Transfers to schools outside an attendance area would be perm/tted for handicapped students or students with special course needs. A majority to minority transfer provision was adopted; that is, the school board would on request permit any student to transfer from a school where his race was in the majority to one where it was in the minority. Finally, the

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[11] See Defendants' Fourth Supplemental Progress Report, filed November 30, 1965.

[12] See Defendants' Fifth Supplemental Progress Report, filed November 8, 1966.

Order required the defendants to take prompt steps to equalize facilities at the formerly black schools.

On its face the plan appeared to be a zoning-type desegregation plan, but actually it was a type of freedom of choice plan. It combined the use of attendance areas with freedom of choice, the freedom of choice being limited to the schools within the student's attendance area. Most of the white schools were placed in attendance areas containing only one school. But every school that was black was placed in attendance areas with one or more white schools.[13] Students in these areas were thus given the option of attending a white school or a black school. As the school board later phrased it, this "enabled the students, without regard to race to have a free choice of more than one school where the student's race was in the minority."[14]

On December 16, 1968, plaintiffs filed a motion for further relief. It alleged:

> [T]he report on the operation of the Freedom of Choice Plan filed with the Court by defendants pursuant to the My 15, 1967 Order of this Court demonstrates that the Freedom of

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[13] This Court considers and defines a white school as a school that is attended by white students only, or whose student body is at least 95% white. A black school is a school with a student population that is all black or at least 90% black. See Supplemental Findings of Fact, filed March 31, 1970; Singleton v. Jackson Municipal Separate School District, 434 F.2d 927, 931 (5 Cir.1970).

[14] Defendants' Comprehensive Plan for Racially Non-Discriminatory School System, filed April 15, 1969, p. 15.

> Choice-Attendance Areas Plan fails to provide a real prospect for dismantling the dual system at the earliest practicable date. During the choice period for the 1968-69 school year out of approximately 7,200 Negro elementary school children in Hillsborough County, only approximately 1,800 chose to attend white elementary schools and cf approximately 2,700 Negro high school students, only 850 chose to attend white high schools, and less than twenty (20) white elementary students chose to attend formerly all Negro schools, and no white high school students chose to attend all Negro high schools. * * * in the Junior high schools no white students chose to go to formerly all Negro junior high schools.

After a hearing on the motion, Judge Lieb entered an order on March 5, 1969, directing the school board, no later than April 15, 1969, to submit a comprehensive plan for establishing a raciall nondiscriminatory school system in Hillsborough County. In formulating the plan the school board was to consider rezoning, consolidation of schools, pairing of schools, or any other method which would effectively eliminate the dual system.

With assurance that "the proposed Plan submitted herewith promises prompt and meaningful progress toward establishing a racially non-discriminatory school system,"[15] the school board filed its new plan on April 15, 1969.

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[15] Id. at p.1.

According to the school board, the Florida School Desegregation Consulting Center at the University of Miami, Coral Gables, Florida, had participated in the preparation of the plan.

Basically, the April 15, 1969 plan wax a slight revision of the plan put into effect by the order of May 15, 1967. It was not the school board's intention to substantially alter the plan already in operation.

> The present attendance areas have brought about desegregation of schools in many neighborhoods. Any further revision of the unified attendance areas would not increase desegregation with a few exceptions that will be discussed [later].* * *
>
> The shifts in population in some formerly predominately white neighborhoods have caused these communities to be predominately Negro. The Negro pupil population in the schools serving these communities has also increased proportionately. To increase the attendance area of any predominately Negro school or predominately white school to bring about more desegregation would cause students so assigned, both Negro and white [,] to travel unreasonable distances. Some schools will always be all Negro and some all white because the communities they serve are all of one race due to voluntary housing patterns.

> It then becomes necessary to unify the attendance areas of these schools to provide these students with the opportunity to attend a school where their race is in the minority.[16]

The system whereunder black schools were placed in attendance areas also containing white schools with students in these areas to choose which school to attend was continued. However, some of these attendance areas were unified. Boundary changes for the attendance areas of other schools were also made, "but the changes will not necessarily affect the racial composition of the schools."[17] In all other respects the plan of May 15, 1967, would be continued.

Plaintiffs objected to the plan. They complained that the plan was simply another free choice system with little prospect of successfully accomplishing desegregation:

> An analysis of this type of zoning reveals a blatant scheme for racial discrimination. Where Negro students are not involved, the defendants have one school attendance area. Where Negroes are involved, there are two or three schools involved, giving a white child[18] the option to continue to attend the white school.

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[16] Id. at pp. 16-17

[17] Id. at p. 18.

[18] Plaintiffs' Objections to Defendants' Proposed Plan, filed May 5, 1969, p. 4.

Concluding that its plan was "inadequate, at the present time," Judge Lieb ordered the school board to "formulate and adopt a revised comprehensive plan specifically considering the use of zoning, pairing "* * *[19]

The plan was filed May 23, 1969. The attendance zones of seven elementary schools were to be revised.[20] Ten elementary schools were to be paired; that is, these schools were placed in five attendance zones with two schools in each zone.[21] Students would attend one of the two schools in their zone and would not have a choice of which school to attend because neither of the schools would have the same grades. The boundaries of six junior high schools would be altered.[22] Three of the senior high schools--Blake, Middleton, and Hillsborough, which under the May 15, 1967, order shared one attendance area--were to be given revised and separate attendance areas. In all other respects the plan of April 15, 1969, wculd be adhered to, and the provisions of that plan were inccrporated by reference into the present plan.

On June 2, 1969, plaintiffs filed objections tc the new plan. On July 18, 1969, the school board filed a motion fcr

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[19] Order of May 9, 1969, pp. 1, 2.

[20] Roland Park, Macfarlane, Williams, Burney, Lincoln, Jackson Heights, Progress Village.

[21] Dunbar was to be paired with Cuesta; Lee with Henderson; Edison with College Hill; Orange Grove with Ybor; and Springhead with Glover.

[22] Just, West Tampa, Booker T. Washington, Young, Memorial, George Washington.

leave to amend the May 23, 1969, plan; this motion was denied the same date. On July 25, 1969, for the third time that year, the school board was ordered by Judge Lieb to submit satisfactory plans for desegregation.

The August 1, 1969, plan established attendance zones for each of the public schools in Hillsborough County. Each school had a separate attendance area except the Macfarlane-Cuesta School. The majority to minority transfer policy was continued. Any junior or senior high school student needing a course of study not offered by the school serving his attendance zone would be permitted to transfer to any school in the county offering that course of study. There were similar transfer provisions for exceptional and handicapped children. In certain cases transfers outside attendance areas were permissible for elementary school children.

Under the plan there were to be 783 blacks, 90 whites at Blake Senior High School, and 993 blacks, 137 whites at Middleton High School. There was to be a student population of 662 blacks, 36 whites at Just Junior High School; 609 blacks, 0 whites at Booker T. Washington Junior High School; and 1,000 blacks, 90 whites at Young Junior High School. Marshall High School in Plant City was to be paired with Tomlin Junior High School. Marshall would have the seventh and Tomlin the eighth and ninth grades.

Seven elementary schools--Carver, Dunbar, Henderson, Meacham, Potter, Roland Park, Shore--were to remain completely black, and 5 more were to be at least 90% black: College Hill, Lincoln, Lomax, Williams, Ybor. There

were to be large concentrations of blacks at Glover, Jackson Heights, Progress Village, and Simmons.[23]

Plaintiffs objected to the plan and asserted that alternatives existed whereby greater desegregation could be achieved.[24]

On August 18, 1969, Judge Lieb entered a Final Order approving the August 1, 1969, plan with minor qualifications. Mannings v. Board of Public Instruction of Hillsborough County, 306 F.Supp. 497 (M.D.Fla.1969) (Mannings II).

In September 1969 plaintiffs appealed. On November 19, 1969, Judge Lieb assigned the case to the undersigned, the fourth judge to preside over these proceedings.

II

On March 6, 1970, the Court of Appeals temporarily remanded the case for limfted purposes. This Court was directed to supplement its findings of fact by (a) filing maps showing the location of each school and the area served by each school so as to reflect student assignments as of October 24, 1969, and (b) filing a table showing the school population, by race, which would result if a neighborhood school attendance policy as defined in Ellis v. Board of Public

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[23] These statistics are taken from the maps filed by defendants to accompany the August 1, 1969, plan.

[24] Plaintiffs' Objections, filed August 11, 1969.

Instruction of Orange County, 423 F.2d 203 (5 Cir.1970), were adopted.[25]

On March 31, 1970, the undersigned filed and forwarded to the Court of appeals the maps and table requested, together with 17 pages of supplemental findings of fact. These findings established that as of October 24, 1969, 91 of Hillsborough County's 124 public schools were identifiable as either black or white. Whites were to be found in 10 white schools containing 61,478, or 74%, of all the white students in the county. The blacks were concentrated in 21 schools containing 12,751, or 65%, of the county's black students. In particular, these findings demonstrated:

> (1) Fifty-two elementary schools with 36,214, or 82%, of the white elementary students were white schools. Sixteen elementary schools.with 8,530, or 74%, of the black elementary students were black schools.
>
> (2) Eleven junior high schools withal3,515, or 68%, of the white junior high students were white schools. Three junior high schools (Just, Booker T. Washington, Young) with 2,334, or 48% of the black junior high school students were black schools.
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> (3) Seven senior high schools with 11,749, or 61%, of the white high school students were white schools. Two senior high schools (Blake

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[25] For a discussion of the Ellis case, see below, pp. 26-28.

and Middleton) with 1, 887, or 58% of the black high school students were black schools.[26]

The supplemental findings also demonstrated that a neighborhood school attendance system would do little to eliminate the dual system. As the undersigned phrased it: "The extent of desegregation achieved by the neighborhood attendance plan is in effect indistinguishable from that achieved under the plan presently in effect[27]. Although it did file the table giving the projected school population resulting from neighborhcod attendance zones, the school board did not file maps showing these attendance areas, and so the Court's reliance on the figures given in the tables was based entirely upon representations made by the schcol board. At least with regard to attendance at Blake and Middleton Senior High Schools, these representations turned out to be highly inaccurate.

III

On May 11, 1970, the Court of Appeals reversed the order which had been entered by Judge Lieb. Mannings v. Board of Public Instruction of Hillsborough County, 424 F.2d 874 (5 Cir.19701 (Mannings III). A panel consisting of Judges Bell, Ainsworth and Godbold found "the Hillsborough system deficient in student assignment throughout the system." 427 F.2d at 876.

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[26] Supplemental Findings of Fact, filed March 31, 1970.

[27] Id at p. 15.

As to student assignment the Court of Appeals, based on the supplemental findings of fact, found "that with the exception of the two all Negro high schools, there would be no substantial change in the racial composition of the schools in Hillsborough County under an Orange County type assignment system. For the reasons which follow, we conclude that the present assignment system is unacceptable as to certain schools." 427 F.2d at 876-877.

On the basis of the projections furnished by the school board in its table attached, to the supplemental findings, the appellate court found that a strict neighborhood assignment system would desegregate the two remaining black high schools. The school board's figures showed that under such a system there would be 877 blacks, 197 whites at Blake, and 1010 blacks, 250 whites at Middleton. In the alternative, the Court was authorized to pair Blake with Plant and Middleton with Hillsborough. The Court of Appeals directed that the three remaining black junior high schools, Just, Booker T. Washington, and Young be paired with Wilson or West Tampa, Franklin or Memorial, and Sligh, Memorial, or Franklin, respectively. Neighborhood attendance zones for the black junior high schools were rejected because according to the school board's table the resulting school population would have been:

	Black Students	**White Students**
Just	592	36
Booker T. Washington	624	15
Young	1,118	90

Turning to the elementary schools, the Court of Appeals stated: "There are 14 elementary schools with virtually alt Negro student bodies." 427 F.2d at 877. This was an error; as the supplemental findings vividly showed, there were 16 elementary schools at least 90% white.[28] The Court of Appeals directed that 6 of these schools be paired-- College Hill with Edison; Dunbar with Tampa Bay; Henderson with Graham; Lincoln with Jackson; Meacham with Gorrie; and Simmons with Burney or Wilson.

The Court of Appeals also stated that it was "conceivable" that "substantially the same result could be achieved in some of the elementary schools by redrawing zone lines instead of pairing." This Court was authorized to consider and permit rezoning as an alternative to pairing where the result would substantially desegregate student bodies, or to permit pairing in some instances and rezoning in others.

The majority to minority transfer policy was left intact. A biracial committee was ordered set up, The appellate opinion was to be implemented by June 6, 1970. Finally, this Court was directed to make its own conclusion by the standards stated in the opinion as to the system being unitary. Once it was found unitary, this Court was to retain jurisdiction for a reasonable period of time in order to insure unitary operation. By rehearing granted on June 2, 1970, the Court of Appeals approved the school board's request:

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[28] The omitted schools were Jackson Heights and Progress Village. Rounded off to two decimal points each school was exactly 90% black 10%white.

> to realign the attendance zones for Just, Booker T. Washington and Young junior high schools as an alternative to pairing Just with Wilson or West Tampa, Booker T. Washington with Franklin, and Young with Sligh, Memorial or Franklin * * * This modification is granted on the representation by appellees [i.e., the school board] that the stated zone line .changes will result in a student population at Jusl of 567 Negro and 107 white students; 625 Negro and 115 white students in Booker T. Washington; and 1,075 Negro and 159 white students in Young. 427 F. 2d at 878. [Emphasis supplied].

IV

On May 13, 1970, this Court ordered defendants to comply with the Court of Appeals mandate. On June 6,1970, defendants file. a Notice of Compliance, and on June 15, 1970, a Detailed Report of Compliance. In the Report the anticipated attendance figures at the two black high schools were different from those given in the table. The attendance boundaries of Blake had been altered and the contemplated attendance was 650 blacks, 60 whites. At Middleton with the same boundaries as before but under a strict neighborhood assignment system with no variances allowed, 1,020 blacks and 115 whites were expected.

Rather than pairing them, as suggested by the Court of Appeals, defendants elected to redraw attendance zone lines for certain elementary schools. Of the 6 black elementary schools ordered desegregated by the Court of Appeals, 1 was

to be closed (Henderson), 3 were to remain all black (College Hills, Dunbar, Meacham), and 2 were to be over 90% black (Lincoln, Simmons).

On June 19, 1970, this Court ordered defendants to file (a) a plan for pairing Blake with Plant Senior High School and Middleton with Hillsborough Senior High School, (b) a plan for pairing the 6 black elementary schools, and (c) any other plan for modifying atlendance zones at the high school and elementary level. In response the school board filed figures making it obvious that more desegregation would be accomplished at the high school and elementary level by pairing than by rezoning.[29]

Plaintiffs' Proposed Plan of Desegregation was filed July 15, 1970. It used a feeder system as the means for estaklishing attendance at junior and senior high schools, and aimed at desegregating every school in Hillsborough County.

Following a hearing on July 22, 1970, at which testimony was heard and evidence received, the Court entered an order stated in part:

> As directed by the court defendant School Board filed a plan of pairing elementary schools amd filed population figures by race of the aforesaid schools both in its proposed rezoning plan and under a pairing plan. Such comparative figures and other evidence received at hearing clearly establishes and the

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[29] Defendants' Information Relating to Pairing Certain Schools and Modifying Attendance Zones, filed July 10, 1970.

> court finds that the rezoning plan for elementary schools as proposed by the School Board does not substantially accomplish the same amount of desegregation as would the pairing plan proposed by the School Board at the Court's direction.[30]

Noting that a further rezoning plan or a plan whereby several elementary schools were grouped might accomplish the desired resul.ts, the Court gave the.school board until August 21, 1970, to file a revised rezoning plan for elementary schools.

Defendants' second rezoning plan was filed August 11, 1970, At the close of a hearing conducted on August 13, 1970, the Court ruled from the bench and found that of the three plans submitted by the school board the pairing plan was the most effective and would be approved. The Court required the school board to file additional information relating to recommendations as to the specific grade locations at the paired schools and further details relating to transfer rules and the biracial committee by August 19, 1970.

On August 19, 1970, defendants presented the Court with three separate supplemental plans for the elementary schools concerned, one of which involved the closing of a sckool and distribution of its pupils to three other schools, and each of which had two or more alternative plans attached thereto.

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[30] Order of August 3, 1970, p. 2.

On August 21, 1970, the Court entered an Interim Order approving various of the plans filed two days before. Henderson was to be closed and its students distributed among Grakan, Lee and Meacham Elementary Schools. The following schools were paired: Carver and Gorrie; College Hill and Edison; Dunbar and Tampa Bay Boulevard; Simmons and Burney; Lincoln and Jackson. The Interim Order also set out the Transfer Rules governing attendance outside assigned schools.

The Interim Order was confirmed and supplemented by a Memorandum and Order entered August 25, 1970.

On August 28, 1970, the school board requested that a change be made in the bodndaries for Blake High School. Preliminary registration of students there indicated that the school would be greatly under capacity when it opened on August 31, 1970. The school board therefore asked the Court to

> zone approximately 290 additional students into Blake High School who are presently residing in the Plant High School district. The race of the students in the proposed change involved is predominantly black, but the exact percentage is not known at the present time.[31]

Following a hearing the Court denied the request without prejudice to its resubmission when more definite fact about enrollment at Blake were known.

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[31] Defendants' Request for Boundary Change at Blake High School, filed August 28, 1970, p. 2.

Thereafter defendants again requested a boundary change for Blake. On September 10, 1970, they stated, student population at Blake was 428, far below capacity. It was requested that the Court:

> consider a change in the attendance boundaries for Blake High School which will zone into Blake High School approximately 241 additional students who are presently residing in the Plant High Sckool attendance area. The race of the students in the proposed change of boundaries is predominantly black.[32]

The second request was denied.[33] Defendants' suggestion that Blake be repopulated by being further resegregated was rejected for several reasons. At hearing on the second request it had keen shown that of the 428 students in attendance at Blake, 426 were black and 2 were white. It had also been shown that all of the students to be zoned into Blake were black. The proposed boundary change would have qiven Blake the same attendance zone it had at the time this case was reversed in May 1970 with the exception of an additional attendance area, containing no whites.

The Court also noted that in the table submitted to the Court during the limited remand in March 1970 the school bcard had projected an enrollment of 877 blacks, 197 whites at Blake under a neighborhood system; that the Court of

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[32] Defendants' Second Request for Boundary Change at Blake High School, filed September 11, 1970, p. 2.

[33] Memorandum and Order, filed September 24, 1970.

Appeals had relied on this representation in directing implementation of such a plan at Blake; that in June 1970 the school board had revised its figures and predicted 650 blacks and 60 whites at Blake; and that at present there were 426 blacks and 2 whites there.

SUPERVENING FACTS AND LAW

On November 12, 1970, defendants filed a Report giving the racial composition of certain schools as of October 23, 1970. Analyzed in light of data previously furnished the Court, the Report demonstrates the ineffectiveness of the August 1970 desegregation decrees.

Chart One[34] traces for four school years the student population by race at 21 schools which were black in September 1967. It shows that these schools have remained identifiably black despite Judge Lieb's order of August 1, 1969, despite the Court of Appeals' reversal on May 11, 1970, and despite the undersigned's orders of August 1970. Both of the high schools remain black. Three of the four junior high schools are black.[35] Ten of the 16 elementary

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[34] See below, pp. i-iv. All of the charts attached to this order are by reference made a part hereof.

[35] Marshall was desegregated under the plan approved August 1, 1969, when it was paired with Tomlin. The school board did not furnish the Court with figures for attendance at Marshall during the 1970-1971 school year.

schools are still black.[36] One has been closed. The remaining 5 are over 50% black.

Chart Two[37] compares the 1969-1970 school year enrollment at 10 black schools directed desegregated in August 1970 with these schools' projected and actual enrollment for the 1970-1971 school year. The figures therein show that both high schools and all three junior high schools are still black. The 5 elementary schools are over 50% black.

The figures also demonstrate that tie school board's representations to this Court and the Court of Appeals were markedly inaccurate. At the high school and junior high school level, there is simply no significant correlation between the enrollment projected by the school board if its plan were adopted and actual enrollment at present. At the elementary school level the percentage of black students at each school is higher than was represented to this Court.

In Chart Three[38] the school board's estimates of school attendance by race at the 5 elementary schools paired with black schools for the 1970-1971 school year .are seen to be highly erroneous. The school board predicted that 3 of the

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[36] The Court has not been informed what the current attendance figures are for 8 of the black elementary schools: Glover, Jackson Heights, Lomax, Potter, Progress Village, Roland Park, Shore, Williams. Since they were not ordered desegregated, there can be little doubt that these schools are still black.

[37] See below, pp. v-vi.

[38] See below, p. vii.

schools would have more white students than black, but it turned out that 4 were black.

II

In Pate v. Dade County School Board, 434 F.2d 1151 (5 Cir.1970), the Court of Appeals disapproved a desegregation plan for Miami, Florida, under which 22 schools with 44% of the black student population were all black or virtually all black. The Court of Appeals stated that "obstacles" such as "traffic hazards, school capacities, individual school programs, format and curricula, walking distances, natural barriers, and grade levels in each school," 434 F.2d at 1154, could not justify a plan resulting in insubstantial desegregation. Using the techniques of pairing and grouping the Court of Appeals reduced the number of blacks attending black schools from 44% to 24%.

In Brown v. Board of Education of City of Bessemer, 432 F.2d (5 Cir.1970), it was stated:

> The restructuring of the grade system in the proposed pairing is not, by itself, such an indicium of educational unsoundness as to render an otherwise feasible alternative unacceptable. * * * No particular grade structure can be considered inviolate when constitutional rights hang in the balance. 432 F.2d at 23. [Emphasis supplied.]

The Court of Appeals proceeded to desegregate by pairing. The Court also updated the majority to minority

transfer provision "so as to provide priority for space to transferees." 432 F.2d at 24.

In Allen v. Board of Public Instruction of Broward County, 432 F.2d 362 (5 Cir.1970), the Court of Appeals observed:

> In the conversion from dual school systems based on race to unitary school systems, the continued existence of all black or virtually all black schools is unacceptable where reasonable alternatives exist. And it is clear that one acceptable way to achieve reasonable alternatives is by pairing schools. The tenor of our decisions is unmistakable: where all black or virtually all black schools remain under a zoning plan, but it is practicable to desegregate some or all of the black schools by using the tool of pairing, the tool must be used. 432 F.2d at 367.

The Court of Appeals directed the pairing and clustering of 13 black elementary schools, thereby desegregating every one of these schools. The Court then said:

> In ordering the pairings and groupings described above we have not suggested which specific grades should be assigned to which specific schools. Those decisions are left to the district court. * * * However, in deciding which grades will attend which schools, the district court is ordered to comply with the

> following requirements: (1) In every attendance zone created by the pairing and clustering the court must make every reasonable effort to avoid "splitting" a grade, i.e., assigning any particular grads to more than one schocl. (2) If in some instances it does become necessary to split a grade, the court will assign the students in that grade in such a manner that the degree of desegregation ordered by this court for that attendance zone will not be diminished. 432 F.2d at 369.

In Singleton v. Jackson Municipal Separate School District, 432 F2d. 927 a plan was found unacceptable under which "approximately 70% of the Negro elementary students will bs in all (or substantially all) Negro elementary schools." 432 F.2d at 928. In a Supplemental Order the Court of Appeals directed the district court's attention to

> our recent cases in which this court has mandated pairings, clustering, or such other equally effective devices to reduce the number of all black schools (90% or more black) and the percentage and number of blacks in all black schools. 432 F.2d at 931.

In Youngblood v. Board of Public Instruction of Bay County, 430 F.2d 625, 629 (5 Cir.1970), the Court of Appeals noted: "This Court requires school boards to draw zone lines sc as to affirmatively promote desegregation of racially dual school systems."

In a series of opinions the Court of Appeals clarified the attendance system set forth in Ellis v. Board of Public Instruction of Orange County, 423 F.2d 203 (5 Cir.1970). In Ellis the panel held that under the specific facts of the case Orange County, Florida, could desegregate by using a neighborhood school attendance system wherein variances were not allowed to permit children a choice of not attending the nearest schools to their residences and thereby avoiding assignment to a formerly black or formerly white school.

The Court of Appeals noted that a neighborhood school assignment system--that is, a system under which a student must attend the school nearest his home--could be of two types. It might take the form of equidistant assignment. "[Z]one lines would be located equidistant between two schools and all students within the zone would attend a given school without regard to the capacity of the school." 423 F.2d at 207. Or a student might attend the school nearest his home limited only by the capacity of the school; if the school was unable to accommodate him he would attend the next nearest school to his residence. The Court of Appeals adopted the latter plan for Orange County.

It was also held that the neighborhood school assignment system, based on school capacity, must be observed without exception. Variations based on traffic Conditions or zone lines were impermissible.

> Variances by arbitrary zone lines, or for reasons of traffic, while reasonable on their face, may destroy the integrity and the stability of the entire assignment plan. If Orange County wishes to maintain a neighborhood

> assignment system, then it must do so without variances. Each student in the system must be assigned to attend the school nearest his or her home, limited only by the capacity of the school, and then to the next nearest school. 423 F.2d at 208.

An Ellis-type plan was rejected in Henry v. Clarksdale Municipal Separate School District, 433 F.2d 387 (5 Cir.1970), where the plan

> proposed to leave unchanged the totally (or nearly so) segregated elementary school program under the zoning system already disapproved by [previous decisions in the case], but now sought to be restored to acceptability and brought forward under the Ellis neighborhood school or geographical proximity or "equal distance zoning" label. No change with respect to the elementary schools of Clarksdale would occur except the nomenclature employed. The racial makeup of pupils attending the several elementary schools would continue exactly as before. 433 F.2d at 390.

Pairing was ordered to desegregate, and objections thereto raised by the school board were dealt with in these words:

> The objections as to children being required to walk as much as two miles as opposed to an average of 0.5 miles heretofore, and of having to travel natural or man-made

> barriers and the claim that a 2-2-2 grade division is somehow less desirable than a 1-6 division, all fail. * * * Barriers which did not prevent enforced seqregation will not be held to prevent conversion to a full unitary system. 433 F.2d at 394. [Emphasis supplied].

Objections based on lack of "articulation" caused by the breakup of grade composition between two or more schools under zoning or clustering were also overruled.

In Valley v. Rapides Parish School Board, 434 F.2d 144 (5 Cir.1970), the Court of Appeals again rejected an Ellis-type plan on the ground that such a plan did not substantially abolish segregation. Pairing, rezoning, and clustering were ordered. The majority to minority transfer provision was modified to require that transferees be given priority for space.

In Ross v. Eckels, 434 F.2d 1140 (5 Cir.1970), all parties agreed that a desegregation plan which had left 77% of Houston's black students in black schools in December 1969 was defective. The district court thereupon ordered an equidistant zoning plan into effect.

The Court of Appeals modified the district court's plan. A geographical capacity attendance plan was adopted for the secondary schools. At the elementary level the equidistant zoning plan was modified in part so that by the technique of pairing the number of blacks in black schools was reduced from 21,418 to 11,982.

The majority to minority transfer plan was altered so that (a) all transferring students were given transportation, and (b) transferees were given priority for space at any school within the system.[39]

A final Court of Appeals decision of interest is Bradley v. Board of Public Instruction of Pinellas County, 431 F.2d 1377 (5 Cir.1970).[40] Bradley involved a school system in close proximity to the Hillsborough system and of great similarity. Under the plan in effect 64% of the black students attended all black or virtually all black schools. The Court of Appeals versed, and, by use of pairing, grouping, and

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[39] Other cases dealing with the Ellis-type assignment plan (but decided prior to August 1970) are Lee v. Macon County Board of Education, 429 F.2d 1218 (5 Cir.1970); Hightower v. West, 430 F.2d 430 F.2d 552 (5 Cir.1970): and Andrews v. City of Monroe, 425 F.2d 1017 (5.Cir.1970).

In Andrews a purported Ellis-type plan was rejected because it resulted in 85% of the black elementary school students and 77% of the black high school students being assigned to traditionally black schools which would remain black. The panel said:

> However, we do not reject the School Board's plan solely on the ground that it does not fit the Orange County definition of a 'neighborhood' system. Even if, as presently constituted, the plan were a true neighborhood plan, we would reject it because it fails to establish a unitary system. Orange County does not say what a "neighborhood" system of student assignment per se is a unitary system. 425 F.2d at 97 [Emphasis supplied].

[40] The Bradley case was decided in July 1970, but because of its obvious applicability to the instant case it is discussed here.

rezoning, reduced the percentage of blacks attending black schools from 64% to 14.2%.

Further proceedings in the Bradley case were held at the district level when the school board failed to desegregate the only remaining black high school, Gibbs High School. On March 15, 1971, the school board filed its plan for desegregating the school. The plan called for the dispersion of all Gibbs students among Gibbs and 5 other high schools, with the result that each of these 6 facilities would have student bodies approximately 83% white and 17% black. A map attached to the proposed plan showed that the desegregation was accomplished by gerrymandered zoning and the use of satellite zones.[41]

On April 15, 1971, the district court approved the school board's plan under this condition proposed by the school board. "that the percentage of black students in any St. Petersburg high school, to wit, Boca Ciega, Lakewood, St. Petersburg, Northeast, Dixie Hollin and Gibbs, shall not exceed twenty-two percent (22%) nor be less than twelve percent (12%) and that it is further recognized that the area zone lines for the respective high schools will have to be adjusted from time to time in order to meet the respective required ratio between black and white students.[42]

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[41] A satellite zone is an area which is not contiguous with the main attendance zone surrounding a school.

[42] Bradley v. Board of Public Instruction of Pinellas County, No. 64-98 Civ. T., Order of April 15, 1971, p. 3.

III

On April 20, 1971, the Supreme Court delivered five opinions which defined with particularity the responsibilities of school authorities and the scope of powers of federal courts in eliminating racially separate public schools established and maintained by state action. Four of these decisions will be discussed here.

In Swann v. Charlotte-Mecklenburg Board of Education, _____U.S. ____, 39 U.S.L.W. 4437 (1971), the district court had dealt with a school system conceitedly not unitary in t969 and with a school board which refused to submit a satisfactory desegregation plan. The district court found that certain of the board's actions were discriminatory; that residential patterns resulted in part from federal, state, and local governmental action; and that the board's actions based on these patterns resulted in segregated education.

The desegregation plan adopted by the district court and affirmed by the Supreme Court proposed assignment of blacks to all ten of the system's high schools. Attendance zones for the high schools were shaped like wedges of a pie, extending outward from the center of the city. The junior high schools were rezoned, and nine "satellite zones" were created. Under the satellite plan, inner city blacks were assigned to 9 outlying predominately white junior high schools. The 76 elementary schools were desegregated by use of zoning, pairing, and grouping; 9 inner city black schools were grouped with 24 white suburban schools. The district court explained the latter aspects of the plan in these words:

> It * * * desegregates all of the rest of the elementary schools by the technique of grouping two or three outlying schools with one inner city school; by transporting black students from grades one through four to the outlying white schools: and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school. Quoted at _____ U.S. at ____, 39 U.S.L.W. at 4440

The Supreme Court determined that the so-called anti-busing provisions of the Civil Rights Act of 1964, see 42 U.S.C. §§ 2000c (b), 2000c-6, do not limit the powers of federal courts to use busing as a mode of accomplishing desegregation. The Court also delineated "the responsibility of local authorities and district courts to see to it that future school construction and abandonment is not used and does not serve to perpetuate or re-establish the dual system." ____ U.S. at ____, 39 U.S.L.W. at 4443.

> The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system.* * * This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the

> separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns, which when combined with "neighborhood zoning," further lock the school system into a mod of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy. ___ _U.S. at _____, 39 U.S.L.W. at 4443.

Although there is no constitutional right to a particular degree of racial balance, racial quotas have a place, in the task of desegregation. The district court used a 71% white-29% black ratio in each school as a starting point in-the process of shaping a remedy. This was held to be proper because (a) the school authorities had maintained a dual system until at least 1969, and (b) the school board had totally defaulted in its duty to come forward with an acceptable plan of its own.

It was the Supreme Court's view that while the existence of a small number of one-race schools is not a sure mark of a segregated system, in systems with a history of discrimination there is "a presumption against schools that are substantially disproportionate in their racial composition." _ __ U.S. at _____, 39 U.S.L.W. at 4445.

> Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominately of one

> race, they have the burden of showing that such school assignments are genuinely non-discriminatory. _____U.S. at _____, 39 U.S.L.W. at 4445.

Majority to minority transfer arrangements "must grant the transferring student free transportation and space must be made available in the school to which he desires to move." _____ U.S. at _____, 39 U.S.L.W. at 4445.

The Supreme Court recognized that the remedial altering of attendance zones--including pairing, clustering, grouping, drastic gerrymandering of attendance zones--may be required to effectuate a unitary system.

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the .interim period when remedial adjustments are being made to eliminate the dual school systems. * * *
>
> Desegregation plans cannot be limited to the walk-in school._____U.S. at _____, 39 U.S.L.W. at 4445, 4446.

The district court's "conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system" was found by the Supreme Court to be "supported by the record." _____ U.S. at _____, 39 U.S.L.W. at 4446.

In Davis v. Board of School Commissioners of Mobile County, _____U.S._____, 39 U.S.L.W. 447 (1971), the Supreme Court reviewed a decision of the Court of Appeals for the Fifth Circuit.

The metropolitan area of Mobile County, Alabama, is divided by a major highway. About 94% of the black students in the metropolitan area live on the east side of the highway between it and the Mobile River. The Court of Appeals treated each side of the highway as distinct, without either interlocking zones or transportation across the highway.

The Court of Appeals approved a plan under which 50% of the black elementary students in the metropolitan area were to attend 6 black schools. All 7 secondary schools formerly black were to be desegregated. Enrollment figures for the 1970-1971 school year made available to the Supreme Court showed that the projections on which the Court of Appeals had relied were inaccurate.[43] Under the Court of

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[43] That the enrollment figures relied upon by the Court of Appeals turned out to be wrong is not the only similarity of the Davis case to the instant one. The panel in Davis consisted of Judges Bell, Ainsworth, and Godbold, who also presided over Mannings III and Ellis. In Davis Judge Bell wrote of the similarities between that case and the present one. See Davis v. Board of School Commissioners of Mobile County, 430 F.2d 883, 886-887

Appeals plan as actually implemented, 64% of the black elementary students in the metropolitan area were concentrated in 9 black school: and over 50%, instead of none, of the black secondary students were attending black schools. The Supreme Court commented:

> As we have held, "neighborhood school zoning,. whether based strictly on home-to-school distance or on "unified geographic zones" is not the only constitutionally permissible remedy: nor is it per se adequate to meet the remedial responsibilities of local boards. Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. A district court may and should consider the use of all available techniques including restructuring of attendance zones and both contiguous and noncontiguous attendance zones. The measure of any desegregation plan is its effectiveness.
>
> On the record before us, it is clear that the Court of Appeals felt constrained to treat the eastern part of Metropolitan Mobile in isolation from the rest of the school system, and that inadequate consideration was given to the possible use of bus transportation and split

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(5 Cir.1970).

> zoning. _____ U.S. at _____, 39 U.S.L.W. at 4448 (1971)

The Court of Appeals was therefore reversed.

In North Carolina State Board of Education v. Swarm, _____ U.S. ___, 39 U.S.L.W. 4449 (1971), North Carolina's Anti-busing Law which prohibited assignment of students for the purpose of achieving a racial balance and busing of students for this purpose was held unconstitutional.

> * * *the Constitution does not compel any particular degree of racial balance or m/mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy.
>
> * * *bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it. ___ U.S. at _____, 39 U.S.L.W. at 4449,4450.

McDaniel v. Barresi, _____U.S.____, 39 U.S.L.W. 4450 (1971), involved an attempt by parents to enjoin the Clarke County, Georgia Board of Education's voluntary desegregation plan. Under the plan geographic zones were drawn to achieve a greater racial balance. The students in 5 heavily black pockets either walked or were transported by bus to schools located in white attendance zones. The Supreme Court reversed the Supreme Court of Georgia and

held that neither the equal protection clause of the 14th Amendment nor the Civil Rights Act of 1964 prohibited the board from implementing such a plan.

STATUS OF THE CASE

I

In addition to those heretofore made in this order, the Court makes the following specific findings of fact:

The Hillsborough System is a Segregated System

The Supplemental Findings of Fact, filed March 31, 1970, are authority for the proposition that the defendants' school system is a racially segregated one. As of October 24, 1969, 74% of the county's white students were in 70 white schools, whereas 65% of the black students were concentrated in 21 black schools.

There has been little improvement during the 1970-1971 year. Figures filed by the school board indicate that as of October 23, 1970, 9,106, or 46%,of the system's blacks were attending 15 black schools.[44] Although they comprised only 19% of the student population, 13,606, or 69%, were in

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[44] The 15 schools are: Glover, Jackson Heights, Lomax, Meacham, Potter, Progress Village, Roland Park, Shore, Williams, Abou, Just, Booker T. Washington, Young, Blake, Middleton. The Court of Appeals expected only 21% of the system's blacks to be in black schools during this school year. Mannings III, 427 F.2d at 878.

28 schools at least 50% black.[45] On the ether hand, 69% of the white students--57,869 out of 83,474-attended 65 schools either all white or at least 95% white.[46]

This Segregation Results from State Action

The racially separate system in Hillsborough County is a consequence of deliberate policy long pursued on defendants' part of separating students solely on account of race.

The State of Florida had constitutional and statutory provisions requiring school segregation on the books until very recently. See, e.g., Art. 12 § 12, Fla. Const. 1885; Section 228.09, Florida Statutes repealed by Chapter 65-239 § 4, Laws of Florida 1965.

Almost ten years ago this Court found as a matter of fact that prior to and after May 17, 1954, defendants operated, maintained and staffed a completely dual school structure. The

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[45] The 28 schools include, in addition to the 15 mentioned in the previous footnote, Bryan, Burney, Carver, College Hill, Dunbar, Edison (Gorrie, Jackson, Lee, Lincoln, Orange Grove, Simmons, Tampa Bay Blvd.)

[46] All figures relating to current enrollment in Hillsborough County schools may be found in Defendants' Reports, filed December 23, 1969, and November 12, 1970, and in the Supplemental Findings of Fact, filed March 31, 1970. In making its computations the Court has used the December 23, 1969, Report's figures as to the total enrollment by race in Hillsborough County. The Court has also assumed that enrollment at schools not included in the Nov. 12, 1970, Report is the same as it was during the 1969-1970 school year.

school board made no attempt whatever to dismantle the system until September 1961. In the intervening ten years the defendant have at no time taken any steps which have had the effect of significantly altering the system's racially biased student assignment system.

In October 1956 the State Department of Education publish a "School Plant Survey of Hillsborough County Schools 1956." This document filed in evidence on December 5, 1 961, contains an index which lists all of the system's schools as of 1956 under the heading of either "White" or "Negro." Among the schools marked "Negro are Blake, Carver, College Hill, Dunbar, Glover (then having grade 1-9), Lomax, Meacham, Middleton, Simmons, and Booker T. Washington. Of these 10 schools, all at present are 50% black and 6 are at least 90% black.

Of the 79 schools listed as white, 38 are today all white or at least 95% white. Seven of the 79 are now at least 50% black-Burney, Edison, Lee, Orange Grove, Shore, Tampa Bay Boulevard, Ybro.

The Survey also describes future school construction; the new schools are categorized as "White" or "Negro."

The School Board published a "Personnel Directory 1958-1959" in early 1959. It was filed in evidence on December 4, 1961. Again the schools are classified as "White" and "Negro." And again, with a few exceptions, the schools listed as "Negro" are still black, and the schools listed as "White" are still white.

In Defendants' Voluntary Proposal to Amend and Expedite Plan, filed February 3, 1965, Potter and Roland Park are labeled "Predominately Negro."

In their Fourth Supplemental Progress Report, filed October 30, 1965, defendants listed 47 elementary schools, 9 junior high schools, and 4 senior high schools as totally white. At present 40 of these elementary schools, 6 of these junior high schools, and 2 of these senior high schools are either all white or at least white. Among the schools described as attended by blacks only were Carver, College Hill, Potter, Roland Park, Williams, Dunbar, Lomax, Meacham, Progress Village, Blake, Middleton, Just, Booker T. Washington, Young, Glover, Simmons, Lincoln.

Space limitations forbid a more exhaustive review of the file directed to this point. It is sufficient to observe that of the one-race schools in existence 5 and 10 and more years ago, nearly all of the ones still in operation are racially identifiable. Most of the schools that were white then are still white, and most of the black schools remain black. There have been changes in the racial makeup of several schools, but on the whole these have simply been drastic inflows of blacks and outflows of whites resulting in resegregation. Although a minority of the formerly white schools has become black, none of the black schools has become white. Prior Plans Have Failed.

The record in this case, including the information in this order and the charts appended hereto, offers patent and undeniable proof that all of the desegregation plans heretofore implemented in Hillsborough County have failed to abolish the dual structure of student attendance.

The first plan began in 1963, In operation from 1963 until 1967, it provided for integration at the rate of one grade a year and contained a minority to majority transfer provision whereby a white student could avoid attendance at a black school even though the black school was closer to home.[47]

From 1967 until 1969 the system operated under an equally ineffective variety of freedom of choice plan. During the 19691970 school year the school board used the attendance zone system disapproved by Mannings III in May 1970. Under the plan the enrollment figures projected by the school board failed to materialize; the black schools which were to have small numbers of whites had only token white attendance or none at all.

During the 1970-1971 school year the system has functioned. under a plan approved by this Court in August 1970. Once again actual attendance by race has not conformed to what was represented to this Court by defendants. The black secondary schools remain black, and at the paired elementary schools the black enrollment is much higher than expected. Numerous other schools remain identably white or black. The reasons why the previous plans failed are obvious. Too much reliance was placed on free choice, transfer provisions other then majority to minority one have been extremely liberal, and no attempt was made to eliminate the black schools except by the addition of a few whites to the black school population.

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[47] Minority to majority transfer policies were disapproved in Goss v. Board of Education of Knoxville, 473 U.S. 683 (1963), and Boston v. Rippy, 285 F.2d 43 (5 Cir.1960).

Defendants Desegregate All Predominately Black School

The Hillsborough County School System is [sic] as a res [sic] of defendants unlawful policies. It follows that the school board must eliminate all vestiges of the discriminatory actions, "root and branch." Green v. School Board of New Kent Count [sic] 391 U.S.430, 438 (1968). This obligation remains even assuming that the defendants in good faith have submitted plans which through no fault of their own failed to accomplish desegregation.

It is indisputable that in systems practicing racial discrimination the fundamental law of the land--the Constitution of the United States--requires the disestablishment of schools in which there is a disproportionately high percentage of black students. In view of the history of this case it is the holding of the Court that defendants must desegregate all schools in their school system where at least half the students are black.[48]

There is no evidence of any substantiality in the record supporting the position that segregation in Hillsborough County is attributable in any measurable degree to voluntary patterns or other factors unaffected by school board activity. As indicated earlier, the record makes plain that prior to and since 1954 certain schools in Hillsborough C6unty have been set aside for black students and others for white students.

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[48] Although there is some language in Mannings II and Mannings III which might be interpreted to indicate that some of the segregation in Hillsborough County is de facto and not de jure, for the reasons that follow the Court finds that all of the predominately black schools in the county must be eliminated.

With exceptions these schools remain racially identifiable. Over the years defendants have submitted numerous plans for desegregation, not one of which has altered the naked fact chat most blacks attend schools which are inordinately black whereas most whites attend schools in which there are no blacks or only minuscule numbers of blacks. The Court has been unable to locate a single instance in the record where defendants took positive steps to end segregation at a black school and thereafter segregation returned fortuitously. Indeed, no serious attempt has ever been made to eliminate the many black schools. Based on experience, the Court concludes that what re-segregation there has been is a consequence of the continued existence of schools identifiable as white or black.

Since defendants have not taken affirmative steps to end their discriminatory student attendance policies, there has not been an end to de jure segregation

The posture of this case has been altered by superseding caselaw. In Davis the Supreme Court reversed the Court of Appeals because insufficient consideration had been given to noncontiguous attendance zones and the use of busing. The similarities of that case involving Mobile County to the instant one have been noted. And in Swann v. Charlotte-Mecklenburg Board of Education the high court fashioned a presumption against one-race schools in school districts with a history of discriminatory practices. The defendant have not met this burden of showing that the present school assignment system is unconnected with their past and present discriminatory actions.

Supervening facts have also affected the .status of the case as in Davis the facts upon which the Court of Appeals relied in instituting its plan have proved to be erroneous. The 5 secondary schools directed desegregated remain black. The percentage of blacks at the paired elementary schools is higher than was represented to the Court at the time pairing was directed and the Court knows, based on its experience in this and other school cases,[49] that the percentage will increase until the schools become all black unless remedial action is taken.

Stated differently, the record supports what the Court has learned in presiding over school desegregation proceedings in this area of Florida: & desegregation plan will be unsuccessful and entails desegregation where a few whites are added to formerly black schools which otherwise remain intact; in short, a plan which anticipates retention of identifiably black schools will fail. Partial desegregation results in white flight, resort to private schools, and other maneuverings which frustrate the course of justice. Successful desegregation must extend throughout the school system and be done in such a way that the tactics which impede court orders are rendered futile.

There is an old equitable maxim that equity delights to do justice, and not by halves. It never had greater application than here. The Court therefore concludes that in order to

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[49] The undersigned has presided over these desegregation cases: Blalock v. Board of Public Instruction of Lee County, No. 64-168, Civ. T.; Harvest v. Board of Public Instruction of Manatee County, No. 65-12 Civ. T.; Mays v. Board of Public Instruction of Sarasota County, No. 4242 Civ. T.

desegregate the Hillsborough County School System all of the identifiably black schools must lose that identity.[50]

II

The applicable legal principles merit reiteration.

Desegregation is an Affirmative Duty of a School Board

Initially it is the duty, not of the Court, not of the plaintiffs, but of the school board acting affirmatively and positively to end segregation in Hillsborough County. The duty is not fulfilled submission of plans which fail to work. Hall v. St. Helena Parish Sch Board, 417 F.2d 801 (5 Cir.1969); United States v. Board of Education of Bessemer, 396 F.2d 44 (5 Cir.1968).

In the past defendants have considered the matter of opposing and appealing orders of the Court in school desegregation matters sufficiently important to supplement the board's legal staff with special attorneys. As this Court noted in its order of August 25, 1970:

> The many factors involved in operating a large school system and the need for long-range plans to guide in site selection, recruitment and placement of teachers, logistics and other things all suggest the

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[50] Thus there is no real conflict between this order and any previous findings in this case. To the extent that any such conflicts are argued it is the view of the Court that it is bound by superseding facts and caselaw.

> desirability of a good comprehensive plan. The record does not indicate that the Board ever made use of the desegregation aids available to it upon request from the various state and federal agencies, or of the expertise in desegregation technique, acquired by counsel for plaintiffs after participating in many desegregation cases.

The board has never employed special consultants .to assist the administrative staff of the board. With the help of the district court there the board in Mecklenburg County, North Carolina recognize such a need and the Supreme Court approved the procedure of the employment of an expert as a consultant. Swarm v. Charlotte-Mecklenburg Board of Education, supra.

As noted, this Court has jurisdiction over school desegregation action in the nearby counties of Manatee, Sarasota and Lee and is by virtue of residency therein and of common knowledge aware of the steps being taken in Pinellas County, the plan for which was ordered by a fellow judge of this Court.

Like Hillsborough, these counties are all on the west coast of Florida and the school problems in each have much in common. Pinellas County, just across the bay has the most similar problems. Each of said counties has accomplished a degree of desegregation in its schools which far exceeds that in Hillsborough. To a considerable extent, and with minor exceptions this results from a difference in attitude expressed and action taken by school boards, school administrative and legal staffs, local newspapers, civic organizations and county

and municipal leaders. For example, shortly after this court's order directing pairing of certain schools, a news story in a local newspaper quoted the Mayor of Tampa as saying that he would transfer his children to a private school and recently a civic club in Tampa publicly commended the Superintendent of Schools and the school board for outstanding service, not directly as a result of, but after notice of the extent of segregation in local schools and the Supreme Court decision in Swan.

The position expressed by counsel for defendants at one of the 1970 hearings that the Constitution does not require integration but only forbids segregation has long been rejected. United States v. Jefferson Board of Education, 372 F.2d 836 (5 Cir. 1966), aff.en banc 380 F.2d 385 (1967).

Desegregation Must Be Accomplished Now

The time for deliberate speed is over, Griffin v. School Board of Prince Edward County, 377 U.S. 218 (1964); that doctrine has been sent "to its final resting place." Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211, 1216 (5 Cir. 1969). It is the obligation of school boards to terminate their dual systems "at once." Alexander v. Holmes County Board of Education, 396 U.S.19, 20 (1969).

By reason of the foregoing, it is

ORDERED, ADJUDGED AND DECREED:

1. No later than June 15, 1971, the school board shall file with the Court and serve upon plaintiffs a plan or plans for desegregating the Hillsborough County School

System in accordance with this order, said plan to become effective with the beginning of the 1971-1972 school year.

2. In formulating the plan, the school board shall follow these guidelines:

(a) The plan shall have as its primary objective the abolition of segregation in all schools in the county, and in particular it shall aim at desegregation of all schools in the county now having a school population at least 50% black.

(b) In preparing the plan the school board shall begin with the proposition that a white-black ratio of 86%/14% in the senior high schools, 80%/20% in the junior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation.

(c) The plan shall accomplish desegregation by pairing, grouping, clustering, and use of satellite attendance zones. Where pairing, grouping, and clustering are used, every effort shall be made to avoid splitting of grades. If in some instances it becomes necessary to split a grade the school board shall file figures showing the extent of desegregation which would result if the grades were not split. No splitting of grades will be approved unless it results in a degree of desegregation equal to that which would result if the grades were not

split. In view of what has gone on before, any proposed desegregation by use of rezoning or gerrymandered zoning shall be supplemental, secondary, and alternative to desegregation by the techniques mentioned earlier in this sub-paragraph (c) and shall not be in lieu thereof. (d) In formulating the plan the school board should consult with experts and authorities in the field of desegregation who are unaffiliated with the Hillsborough County School System. (e) In formulating the plan the school board shall examine and consider the plans used and in effect in Manatee, Sarasota, Lee and Pinellas Counties and should consult with school officials in those counties. The Clerk of the Court is directed to make the files in these cases available to defendants.

3. On May 21, 1971, May 28, 1971, and June 4, 1971, the school board shall file with the Court status reports detailing its steps taken in complying with this order.

4. As noted, the location of new school sites is a matter directly affecting existing segregation in schools. If the board requires court consideration of new school site locations or purchases it may submit a request for the same at any time.

5. Should the school board again default on its obligation to present a legally acceptable plan the Court will direct its attention to the provisions of plaintiffs' proposed plan of July 15, 1970. The Court will also then determine whether to appoint at defendants' expense an expert or experts

in the field of education for the purpose of obtaining a satisfactory desegregation plan.

6. Copies of this order will be sent to each of Present members of the school board, as well as the superintendent of schools.

7. Jurisdiction is retained.

DONE and ORDERED at Tampa, Florida, this 11th day of May, 1971.

/s/_____
Ben Krentzman
UNITED STATES DISTRICT JUDGE

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CHART ONE
STUDENT POPULATION BY RACE
AT SELECTED HILLSBOROUGH
COUNTY SCHOOLS

CHART ONE

STUDENT POPULATION BY RACE AT SELECTED HILLSBOROUGH COUNTY SCHOOLS

1967-1970

A. SENIOR HIGH SCHOOLS

SCHOOL	1967-68 School Yr. as of 9-15-67.[1]		1968-69 School Yr. as of 9-17-68.[2]		1969-70 School Yr. as of 10-24-69.[3]		1970-71 School Yr. as of 10-23-70.[4]	
	BLACK	WHITE	BLACK	WHITE	BLACK	WHITE	BLACK	WHITE
BLAKE	1122	0	855	0	877	0	526	0
MIDDLE-TON	1021	0	1029	0	1010	3	1028	5

[1]See Defendants' Report, filed September 20, 1967.
[2]See Defendants' Report, filed September 25, 1968.
[3]See Defendants' Report, filed December 23, 1969.
[4]See Defendants' Report, filed November 12, 1970.

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CHART ONE
STUDENT POPULATION BY RACE
AT SELECTED HILLSBOROUGH
COUNTY SCHOOLS
continued

CHART ONE (CONT.)

B. JUNIOR HIGH SCHOOLS

SCHOOL	1967-68 School Yr. as of 9-15-67.		1968-69 School Yr. as of 9-17-68.		1969-70 School Yr. as of 10-24-69.		1970-71 School Yr. as of 10-23-70.	
	BLACK	WHITE	BLACK	WHITE	BLACK	WHITE	BLACK	WHITE
JUST	463	0	662	0	592	3	535	9
BOOKER T. WASHINGTON	683	0	612	0	624	0	591	49
YOUNG	1208	0	1174	0	1144	0	1142	59
MARSHALL[5]	648	0	666	0	126	429		

[5]Marshall was a combination junior-senior high school containing grades 7 through 12 until June 1969. Beginning with the school year 1969-1970 it was paired with Tomlin Junior High School and limited to the 7th grade. See defendants' plan filed August 1, 1969.

[FOLD-OUT]

CHART ONE
STUDENT POPULATION BY RACE
AT SELECTED HILLSBOROUGH
COUNTY SCHOOLS
continued

CHART ONE (CONT.)

C. ELEMENTARY SCHOOLS

SCHOOL	1967-68 School Yr. as of 9-15-67. BLACK	WHITE	1968-69 School Yr. as of 9-17-68. BLACK	WHITE	1969-70 School Yr. as of 10-24-69. BLACK	WHITE	1970-71 School Yr. as of 10-23-70. BLACK	WHITE
CARVER	645	0	645	0	[illegible]	0	339	156
DUNBAR	729	0	773	0		0	440	76
GLOVER	248	0	241	0	[illegible]	0		
JACKSON HEIGHTS	379	146	488	78	[illegible]	43		
LINCOLN	502	0	508	0	[illegible]	0	369	132
LOMAX	593	0	619	0	[illegible]	0		
MEACHAM	681	0	513	0	[illegible]	0	706	7
POTTER	761	0	783	1	[illegible]	0		
PROGRESS VILLAGE	517	0	460	0	543	58		
ROLAND PARK	340	0	322	0	367	6		
SHORE	384	0	318	0	365	0		
SIMMONS	205	0	189	0	233	0	174	136
WILLIAMS	621	12	612	19	665	20		
YBOR	385	10	372	6	363	7		

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CHART ONE
STUDENT POPULATION BY RACE
AT SELECTED HILLSBOROUGH
COUNTY SCHOOLS
continued

CHART ONE (CONT.)

C. ELEMENTARY SCHOOLS

SCHOOL	1967-68 School Yr. as of 9-15-67. BLACK	WHITE	1968-69 School Yr. as of 9-17-68. BLACK	WHITE	1969-70 School Yr. as of 10-24-69. BLACK	WHITE	1970-71 School Yr. as of 10-23-70. BLACK	WHITE
COLLEGE HILL	860	0	921	0	998	2	534	119
HENDERSON	441	1	366	2	394	0	CLOSED	

[FOLD-OUT]

CHART TWO
STUDENT POPULATION BY RACE
AT SCHOOLS DESEGREGATED
IN AUGUST 1970

CHART TWO

STUDENT POPULATION BY RACE AT SCHOOLS ORDERED DESEGREGATED IN AUGUST 1970

SCHOOL	1969-70 School Yr. as of 10-24-69.[1]		Projected enrollment 1970-71 School Yr. as represented to Court by school bd.[2]		Actual enrollment 1970-71 School Yr. as of 10-23-70.[3]	
	BLACK	WHITE	BLACK	WHITE	BLACK	WHITE
BLAKE	877	0	877	197	526	0
MIDDLETON	1010	6	1010	250	1028	5
JUST	592	3	567	107	535	9
BOOKER T.	624	0	625	115	591	49
YOUNG	1144	0	1075	159	1142	59
CARVER	721	0	367	287	339	156
COLLEGE HILL	998	2	667	201	534	119
DUNBAR	661	0	329	325	440	76
LINCOLN	575	0	272	147	369	132
SIMMONS	233	0	66	102	174	136

N.B. Henderson Elementary, ordered desegregated by the Court of Appeals, was closed in June 1970. Its students were distributed among Graham, Lee, and Meacham. At the school board's request this Court did not pair Meacham Elementary, although it was ordered desegregated by the Court of Appeals.

[1] See Defendants's Report, filed December 23, 1969.

[2] See Chart attached to Supplemental Findings of Fact, filed March 31, 1970, and submitted by the school board; see also Defendants' Information Relating to Pairing Certain Schools,

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CHART TWO
STUDENT POPULATION BY RACE
AT SCHOOLS DESEGREGATED
IN AUGUST 1970
continued

CHART TWO (CONT.)

1970-1971 school year population at Blake would be 650 blacks, 60 whites, and at Middleton would be 1020 blacks, 115 whites.

[3] See Defendants' Report, filed November 12, 1970.

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CHART THREE
SCHOOL POPULATION BY RACE
AT SCHOOLS ORDERED PAIRED WITH BLACK
SCHOOL IN AUGUST 1970

CHART THREE

SCHOOL POPULATION BY RACE AT SCHOOLS ORDERED PAIRED WITH BLACK SCHOOLS IN AUGUST 1970

SCHOOL	1969-70 School Yr. as of 10-24-69.[1]		Projected enrollment 1970-71 School Yr. as represented to Court by school board.[2]		Actual enrollment 1970-71 School Yr. as represented to Court by school bd.[3]	
	BLACK	WHITE	BLACK	WHITE	BLACK	WHITE
JACKSON	2	454	225	305	269	259
GORRIE	78	557	374	264	182	436
BURNEY	72	215	138	194	108	69
EDISON	39	456	323	237	254	168
TAMPA BAY BLVD.	4	690	278	345	304	223

[1]See Defendants' Report, filed December 23, 1969.
[2]See Defendants' Information Relating to Pairing Certain Schools, filed August 19, 1970.
[3]See Defendants' Report, filed November 12, 1970.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

No. 3554 Civ. T.
[Filed July 6, 1971]

ANDREW L. MANNING, et al, Plaintiffs,

vs.

THE BOARD OF PUBLIC INSTRUCTION OF HILLSBOROUGH COUNTY, FLORIDA, et al, Defendants.

OPINION AND ORDER

On May 11, 1971, this Court entered an Opinion and Order which among other things directed defendants to file a comprehensive plan, or plans, for desegregating the Hillsborough County School system effective with the beginning of the 1971-1972 school year. The findings and conclusions in said order are by reference made a part hereof.

Hearing was noticed for June 24, 1971, and on June 3, 1971, the Court entered an order outlining the procedure to be followed thereat.

The defendants filed the status reports and a plan as directed.

On May 18, 1971, plaintiffs filed a motion requesting that any order of desegregation to be entered contain faculty desegregation and policies and general reporting provisions as set out therein and that the Court retain jurisdiction. Plaintiffs did not file a written plan of desegregation or written objections to the plan filed by the school board. They offered verbal objections at the evidentiary hearing but no fact witnesses or evidence as such. At hearing defendants requested permission to file a responsive memorandum to plaintiffs' motion. Plaintiffs indicated that no further memoranda would be filed. Defendants' responsive memorandum will be separately discussed hereafter.

THE HEARING

The procedure at hearing followed that prescribed in the Court's order of June 3, 1971. The plans, maps, etc. filed by the board fully complied with the Court's order of May 11th and June 3rd as to form. At hearing they were clearly and completely explained and demonstrated through testimony with the use of visual aids and maps. Plaintiffs cross-examined defendants witnesses. As indicated plaintiffs offered no written plan or evidence. A full hearing was accorded all parties and thereafter those present as spectators who wished to be heard were heard. The hearing was of course attended and reported by the official court reporter.

BRIEF DESCRIPTION OF SCHOOL BOARD PLAN

Separate plans are offered for desegregation of elementary junior high and senior high schools.

Elementary School Desegregation Plan

There are eighty-nine elementary schools in Hillsborough County. Under the plan offered by the school board seventy seven of these schools are effectively integrated through utilization of seventeen clustering arrangements. In each arrangement one formerly predominately black elementary school is clustered with from two to five formerly predominately white elementary schools. The black elementary school becomes a sixth grade center, and all sixth graders from the black school and each of the white schools attend this sixth grade center. First through fifth graders in the black school are distributed among the white schools through the use of satellite zones which cover the boundaries of the black school. First through fifth graders who reside within the boundaries of the white school continue in attendance at the school previously attended.

Graham and Gorrie elementary schools are effectively integrated through rezoning. All first through sixth graders who reside within the new boundaries of each school would attend that school.

Tinker elementary school is effectively integrated through utilization of satellite zoning from the boundary formerly encompassed by Abou elementary school, which under the school--board's proposed plan will be closed.

Four elementary schools within the system were effectiuel integrated during the 1970-1971 school year by rezoning. These are West Shore, Sulphur Springs, Thonotosassa and Wimauma elementar schools, each of which is for first through sixth grades. Under the plan proposed by the school board, no change would be made in the boundaries of these schools.

The plan proposed by the school board calls for the closing of only one elementary school. This is formerly predominatt black Ybor elementary school. In support of closing this school, the school board has presented evidence to show that this school plant is not adequate to serve as an elementary school.

The defendants' plan for elementary schools is fully described in defendants' Exhibit 6-A, which was received in evidence is a part of the record and is incorporated herein by reference.

Junior High Schools

There are twenty-three junior high schools and three junior-senior high schools. Under the plan offered by the school board these schools are effectively integrated through utilization of clustering and satellite zoning arrangements. There are eight cluster arrangements proposed in the school board plan. in each arrangement one formerly predominately black junior high school is clustered with from one to three formerly predominately white junior high schools. The black junior high school becomes a seventh grade center, and all seventh graders from the black school and each of the white schools attend this seventh grade center Eighth and ninth graders from the black Junior high school are distributed

among the white junior high schools through the use of satellite zones which cover the boundaries of the black school. Eighth and ninth graders who reside within the boundaries of the white school continue in attendance at the school previously attended.

No junior high schools are closed under the plan proposed by the school board. Memorial Junior High School would use the facilities formerly utilized by Middleton High School which is to be closed.

The defendants' plan for junior high schools is fully described in defendants' Exhibit 7-B, which was received in evidence, is a part of the record and is incorporated herein by reference.

Senior High Schools

There are at present fourteen senior high schools in Hillsborough County, including three junior-senior high schools. Under the plan offered by the school board, the formerly black high school, Blake, would no longer exist and formerly black Middleton High School would be relocated and merged with Hillsborough High School. The facilities of these former high schools would be utilized in conjunction with the proposed plan for integration of junior high schools, described supra. The attendance area formerly served by Blake is divided among a new high school, which is not yet completed, and Plant and Robinson high schools. The new high school designated "High School C", will be housed until it is completed at Leto High School, and will be the afternoon session at Leto. Satellite zones are utilized to increase the percentage of blacks at Plant and Robinson.

The location for new High School C has been approved by the school boards the appropriate zoning board and this court. The money for its construction is available and construction is expected to begin in the near future.

Middleton High School is merged with Hillsborough High School, and the resulting amalgamation has been designated"Hillsborough-Middleton". Hillsborough-Middleton will utilize the Memorial Junior High School facility, which is located adjacept to what is now Hillsborough High School. As has been stated, the old Middleton facility will become Memorial Junior High School. Portions of the attendance zone formerly served by Middleton High School will be divided into satellite attendance zones for Leto, Chamberlain and Brandon High Schools. The percentage of blacks in attendance at King High School will be increased through a zoning change.

The County's rural high schools are effectively integrated under the school board's plan through utilization of rezoning and satellite zoning techniques. These schools are East Bay, Pinecrest, Plant city, and Turkey Creek high schools. One other high school, Tampa Bay Technical High School, has no precise boundaries, is presently effectively integrated and would be so maintained.

The defendants' plan for senior high schools is fully described in defendants' Exhibit 8-B, which was received in evidence, is a part of the record and is incorporated herein by reference.

PLAINTIFFS' OBJECTIONS

At hearing the plaintiffs did not question the effectiveness of the plan in desegregating the school system, but objected in part to the way it would be accomplished, and contended that it would place an undue and discriminatory burden of desegregation upon black pupils for the following reasons:

1. That proportionately more black students will be bussed than white students as a result of the utilization of sixth and seventh grade centers and their location primarily at formerly predominately black schools.

2. That as a result of the closing of Abou Elementary School and Blake High School and the relocation and merging of Middleton with Hillsborough High School, the formerly predominately black Abou Elementary School and Blake and Middleton High Schools will lose their identity as "community" schools.

Implementation of the plan probably will result in proportionately more black students being bussed than white students. It certainly will result in the bussing of less students over all. If each of the elementary schools retained its character as grades one through six and each of the junior high schools retained its character as grades 7, 8 and 9, satellite zones would have to be utilized in order to bring

whites into the formerly black schools. This would provide an invitation to either "white flight" or "black flight", or both.

The evidence indicates that the site and facilities at Abou Elementary School are substandard. This school should have closed some time ago and the discretion of the school board in doing so at this time should not be disturbed. Testimony indicates that most of the system's high schools are built to serve a capacity of from about 2,000 to 2,500 students. The capacity of Blake High School is less than 1,000 and that at Middleton High School is 1,100. The defendants urge that Middleton was originally reconstructed to serve as a junior high school and that its facilities are only barely adequate to serve as a high school. Testimony indicates that the facilities at Middleton must ultimately be used to house a junior high school and that now is the best time to make the transition, particularly where it is an integral part of desegregating the entire school system. The Court's order of May 11, 1971, outlines previous attempts to desegregate Blake High School. The suggestion that the two high schools should remain as "community" schools has been considered. The Supreme Court has indicated that this is not a criteria to be considered in accomplishing school desegregation. The school buildings themselves will continue where they are and to the extent that they have been previously available for non-school uses will continue to be so available. Upon consideration of the over-all plan, the size and content of the prospective school sites and facilities, and the part the proposed action of the school board will contribute to the success of the desegregation plan, the Court finds that the school board has acted in good faith in proposing the closing or re-location of the named schools and that such action would be a reasonable part of a workable plan of desegregation. The

Court further finds that the implementation of the plan would not constitute invidious discrimination as proscribed by the Fourteenth Amendment.

PLAINTIFFS' MOTION

In Mannings v. Board of Public Instruction of Hillsborough County, Florida, Fifth Circuit 1970, 427 F.2d 874 at 876, the Court said:

FACULTY AND STAFF

> The faculty and staff desegregation standard enunciated in Singleton v. Jackson, supra, requires assignment on a basis whereunder the ratio of Negro to white teachers and staff members in each school is substantially the same as each such ratio is to teachers and staff in the entire school system.
>
> The Hillsborough County school system does not now meet this standard but has moved in large measure in that direction. The faculty ratio of the system is 82 per cent white and 18 per cent Negro. The present faculty ratio in schools having white student bodies is 90 per cent white and 10 per cent Negro. The faculty ratio in schools having Negro student bodies is presently 50 per cent white - 50 per cent Negro. The plan of the system is to go to the Singleton racial ratio in each school beginning with the next school term. The district court is

> directed to require that this be accomplished not later than June 6, 1970."

In its order of August 25, 1970, this Court ordered:

> "3. Principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for black students or white students. Such personnel shall be assigned so that the ratio of black to white teachers in each school, and ratio of other staff in each are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system."

In their motion dated May 18, 1971, plaintiffs do not suggest that this requirement has not been met, but request a continuation of this requirement, together with detailed procedure to be followed by the school board in constitutionally effectuating the requirement from time to time.

In its reply memorandum defendants represent that faculty desegregation was accomplished at every school location in the 1970 school year and that it knows of no complaints regarding discriminatory practice in the effectuation thereof. This Court has not found or held to the contrary. It will continue the requirement for faculty desegregation but finds no basis for the procedural requirements suggested by plaintiffs in advance of the need therefore.

In its order of August 25, 1970, this Court required the filing of a status report on November 16, 1970. Plaintiffs now suggest that reports be filed on August 15th and March 15th, each report setting forth detailed information as contained in Annex B to this motion. The defendants suggest one annual report as of April 30th covering both teacher and pupil ratios.

The Court will retain jurisdiction of this cause and will require the status report to be filed on or before November 17, 1971. If the need for further reports are thereafter suggested or indicated they will be required.

To the extent not otherwise granted in part, plaintiffs motion is denied.

MAJORITY TO MINORITY TRANSFER

OTHER TRANSFER RULES

BI-RACIAL COMMITTEE

APPROVAL OF SITE LOCATIONS

Each of these has been required by previous orders of this Court. Some of them may not be required if the board's plan is effectuated and accomplished.

In its responsive memorandum of June 28, 1971, the defendants say:

> "(a). Should the Desegregation Plan submitted by Defendants to the Court be

> approved, there would seem no purpose for retaining the majority to minority provisions for transfer, since such plan should result in a black to white ratio of approximately 20% to 80% in each and every school; accordingly, and of necessity, black students would be in a minority in schools at all levels....."

The Court is retaining jurisdiction and will require the continuation of all of these procedures to be available and used as necessary.

THE SUFFICIENCY OF THE PLAN

The Court finds that the plan fully complies with the Court's order of May 11, 1971, and the law and will result in the establishment of a unitary school system in Hillsborough County, Florida.

THE CONTINUING RESPONSIBILITY

The record reflects the procedure followed by the defendants in developing the plan. At hearing the Court commended the defendants, their staff and attorneys for this procedure. It involved the entire community and with the cooperation of the press, the public was fully informed from time to time of the reasons for and diligence of all concerned. Without agreeing as to the desirability of the Court's order the defendants followed it as being the law. For the record the Court repeats its appreciation and commendation.

As has been emphasized in previous orders, the school board has a continuing responsibility. The defendants

represent that the plan can and will be effectuated. The Court will require that this be done. To do so will require the same type of community involvement, diligence and effectiveness as has been recently shown.

Upon consideration of the evidence received, the suggestion and arguments of counsel, the cited cases, and independent research of the Court, it is:

ORDERED:

1. The comprehensive plan for desegregation of the Hillsborough County school system effective with the beginning of the 1971-1972 school year as embodied in defendants' Exhibits 6-A, 7-B and 8-B, received in evidence in this case, is approved and defendants are directed to implement the same.

2. As previously ordered the transportation system of the Hillsborough County School system, all facilities of the school and all extra-curricular activities shall be completely re-examined regularly by the superintendent, his staff, and the Board. Bus routes and the assignment of students to buses will be designed, to assure the transportation of all eligible students on a non-segregated and otherwise non-discriminatory basis and all facilities of the system and extra-curricular activities of the students therein shall be so maintained and operated.

3. Principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicafe that a school is intended for black students or white students. Such personnel shall be assigned so that the ratio of black to white teachers in each school, and ratio of other staff in each are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.

4. As previously ordered all school construction, school consolidation and site selection, (including the location of any temporary classrooms) in the system shall be done in a manner which will prevent the recurrence of the dual school structure.

5. On or before August 2, 1971, a Bi-Racial Advisory Committee shall be constituted and thereafter shall operate in accordance with the provisions of Exhibit I hereto attached and by reference made a part hereof. This order supersedes all previous or orders relating to a Bi-Racial Advisory Committee.

6. In effecting transfers of students during the operation of the plan the school board shall follow the rules and procedure set out in Exhibit 2 attached hereto and by reference made a part hereof.

7. The board is directed to file and serve on or before November 17, 1971, a report indicating the status of school and faculty population by race in each of the schools of Hillsborough County, Florida, as of a date to be selected by the board, which is between October 15, 1971, and the date the report is filed.

8. Jurisdiction is retained in this cause for such further action as may be necessary and required.

DONE and ORDERED at Tampa, Florida, this 2nd day of July, 1971.

/s/_____
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

Exhibit I

HILLSBOROUGH COUNTY, FLORIDA

SCHOOL BI-RACIAL ADVISORY COMMITTEE

A. Purpose - To serve in an advisory capacity to the School Board in the areas of the operation of transfer rules including majority to minority transfers, the maintenance of zone lines, pairing and grouping problems and in consideration of location of future school site locations; to provide a means for direct access and communication with the school administration, and ultimately with the School Board of Hillsborough County.

B. Structure - This Bi-Racial Advisory Committee will consist of ten members who shall be residents of Hillsborough County, Florida. Five members will be selected by the School Board of Hillsborough County, Florida, with three of the five members being white and two members black. Five members will be selected by the attorneys of record for the plaintiffs in this action. Of these five appointments, three will be black and two white. The net results will be a ten-member committee with equal racial representation. Each member will serve for a one-year term. A member may be re-appointed. The Chairman of the Committee will be selected by the committee itself with the chairmanship

alternating each year between a black and a white chairman. One or more members of the school administrative staff wil be assigned to assist the committee.

Exhibit 2

TRANSFER RULE
HILLSBOROUGH. COUNTY SCHOOLS

EFFECTIVE 1971-1972 SCHOOL YEAR

No student will be allowed to transfer from his or her assigned school except as follows:

1. Majority to minority transfer - Any student shall be permitted to transfer from a school in which his race is in the majority in order to attend the closest school to his residence in which his race is in the minority.

Said transfer shall be permitted at the beginning of each semester.

If a child is entering the Ninth or higher grade, or if the child is sixteen years or older, he may make a choice himself. Otherwise, a parent or other adult serving as a parent must sign the transfer form.

The transfer forms shall be available at each public school in Hillsborough County and the County School offices.

The transfer form shall be completed at least fourteen (14) days prior to the beginning of the semester.

A choice of transfer once granted cannot be changed within the semester.

The transferee is to be given priority for space and thus the transfer is not to be dependent on space being available.

Transportation will be provided by the School Board in service or in kind to the school to which the transfer is made if that school is more than two miles from the home.

2. Transfers may be granted when recommended by the Juvenile Court.

3.Transfers may be granted for children who are exceptional children as defined by State Law or regulation.

4. Children of teachers and certified instructional staff members who reside in Hillsborough County may attend the school wherein their parents are employed.

5. Transfers may be granted students attending Tampa Bay Vocational-Technical High School to the capacity of the building.

6. Transfers may be allowed in cases of severe hardship after determination of each case by the Board.

Transfers under 3, 5 and 6 will be approved by the board only after consideration of recommendations from the school Bi-Racial Advisory Committee. They shall be considered without regard to race except that special attention will be given to insure that transfers are not approved which are made for the purpose of avoiding desegregation. Transfers under 1 and 4 above shall be reported to the school Bi-Racial Committee for its information.

APPENDIX 4

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

[Filed October 14, 1991] ????

CASE NO. 71-3554-CIV-T-17

ANDREW L. MANNINGS, et al.,	)
Plaintiffs,	)
	)
vs.	)
	)
THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly BOARD OF PUBLIC INSTRUCTION OF HILLSBOROUGH COUNTY, FLORIDA), et al.,	)
Defendants.	)
	)

CONSENT ORDER

The parties, by their undersigned counsel, have agreed to the entry of this Order modifying the prior Orders of this Court concerning the desegregation plan for the public schools of Hillsborough County. The provisions of this Consent Order result from the school district's comprehensive study of the educational advantages of reorganizing its grade structure to

establish "middle schools" serving grades 6-8, and the School Board's conclusion, following that study, that implementation of the middle school grade structure is desirable. Because this change affects not only the curriculum and staffing of school facilities but also patterns of student attendance, it necessarily requires modification of the Court's Orders in this action. For that reason, the school district's administrative staff has had extensive discussions with counsel for plaintiffs in this action to ensure, if possible, that plans for the implementation of the middle school concept were formulated in a manner that addressed the interests and concerns of the plaintiff class of schoolchildren and their parents in this action. The provisions of this Consent Order and the attachment hereto, resulting from that process, have been approved by the School Board and are supported by both parties. Counsel for the parties have represented to the Court that in their opinion, the modifications set forth in this Agreed Order meet applicable constitutional standards and will continue the progress of the Hillsborough County public schools toward a unitary system from which all vestiges of past discrimination have been eliminated.

The Report of the Middle School Task Force adopted by the School Board of Hillsborough County on July 23, 1991 is appended hereto as Exhibit "1" and is incorporated into this Order. The Task Force Report includes (as Appendix 1) proposed modifications (projected to be implemented over a seven-year period) of grade organization and student assignments in the Hillsborough County school system to accommodate the establishment of middle schools.

Because a fundamental mechanism for desegregation established in the Board's plan approved by this Court's July

2, 1971 Order has been the operation of single-grade or two-grade school centers in predominantly black neighborhoods of Hillsborough County, the creation -- on a uniform basis throughout the district -- of three-grade middle schools and four-year high schools necessarily requires this Court's approval before initial implementation can occur. It is the parties' purpose, in submitting this Consent Order, to permit the phased implementation process to commence.

At the same time, the parties recognize that the specific student attendance proposals contained in Appendix 1 to the Task Force Report are based upon projections and are subject to appropriate modification prior to actual implementation, in order to take account of intervening demographic or other changes and in order to carry out the explicitly articulated goals of the program.* As the Task Force Report states (at p. 26):

> Based on current information, plans through 1995-1996. can be formulated with some degree of assurance. Planning beyond that timeframe must be viewed as tentative because more information is needed to make accurate predictions. It is anticipated that installation of the GEO system purchased for the school system will be of great assistance in the analysis needed to fully develop the following long-range plan.

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* The Middle School Task Force was charged with the development of a plan that would "retain a desegregated school system" (Task Force Report, at p. 8 ¶ 1.1.

Therefore, the parties have proposed to submit to the Court, no later than April 15 of each year, a report on progress made in implementing the long-range plan contained in the Task Force Report, as well as a specific listing of student attendance changes to become effective in the following school year and new construction (not previously approved) to be undertaken, subject to the Court's approval.

Further, the student assignment and other changes recommended in the Task Force Report will require the development and application of specific operational policies and procedures, for example for the purpose of implementing admissions to magnet schools and programs in a manner that assures the desegregated status of the system (see Task Force Report, at p. 19 § 2.2.2.6; p. 21 § 2.2.3.6). The parties agree that the necessary planning and development of these policies and procedures must be completed prior to the initial implementation of modifications to the Court's prior Orders in this case. The parties expect this work to be completed during the 1991-92 school year (see Task Force Report, at p. 27) and they will report to the Court on such matters no later than April 15, 1992 and request approval of the specific policies or procedures that are proposed to be implemented.

The Court, upon due consideration of the parties' submission and of the entire record herein, concludes that the long-range plan incorporated in the Middle School Task Force Report (Exhibit "1" hereto) should be approved in concept so that initial implementation may commence. It is therefore ORDERED, ADJUDGED and DECREED as follows:

1. The Middle School Task Force Report appended hereto as Exhibit "1," including the projected modifications of

student assignment proposed in Appendix 1 of that Report and in the Magnet Schools Proposal which is Appendix 4 of that Report, is hereby approved in principle and in concept, and the School Board of Hillsborough County is authorized to continue the planning necessary to implement the proposal over the seven-year period suggested by the Report (at pp. 27-29).

2. The parties shall confer periodically during the period of implementing the middle school proposal and Task Force Report for the purpose of reaching agreement on specific implementation steps. Such discussions shall take place at appropriate times and with adequate frequency to facilitate the prompt and timely resolution of any insoluble differences of position by the Court, as well as the smooth and orderly implementation of the middle school proposal. The parties shall annually report in writing (jointly or, if necessary under the circumstances, separately) to the Court no later than April 15 the progress made in implementing the recommendations contained in the Task Force Report.

3. The report to be filed annually by April 15 shall also include a description of changes in facility utilization, student attendance, grade structure, or curriculum, etc. that are proposed to be implemented in the succeeding school year, and sufficient information relating to such changes to permit the Court to determine their impact upon the maintenance of desegregated schools in Hillsborough County and the elimination of any lingering vestiges of prior discrimination from the school system. The Court recognizes and anticipates that there will be modifications each year of the projected student assignment patterns contained in Appendix 1 to the Task Force Report to take account of demographic or other

changes that occur. In making such modifications, the school district should seek to minimize (to the extent practicable the number of schools which deviate from the system-wide student enrollment ratios (see Task Force Report, at p. 14). The school district shall not implement changes until they have been approved by the Court.

4. The report to be filed annually by April 15 shall also include a description of all proposed school construction (including substantial renovation and remodeling) that is planned and that has not yet been specifically approved by the Court (whether or not the construction is described or referred to in the Task Force Report) including sufficient information about proposed construction projects to permit the Court to determine their impact upon the desegregation status of the Hillsborough County public schools. In the event an objection to any proposed construction project is served upon counsel for the school district, then the school district shall not undertake any such construction project until it has been approved by the Court.

5. The report to be filed no later than April 15, 1997 shall include, as separate exhibits or appendices, specific procedures and adequate policies to support and control student assignments, to design school attendance zones, to determine the configuration of the clusters, to design and monitor magnet school and programs, to monitor desegregation equity and to determine the use facilities" (Task Force Report, at p. 15 ¶ 1), together with sufficient background information to permit the Court to determine the adequacy of what is proposed to guide implementation of the middle school program in accordance with its goals and the requirements of the law.

6. Additionally, the report to be filed no later than April 15, 1992 shall include, as separate exhibits or appendices, adequate descriptive material and policies, guidelines, or resolutions adopted by the School Board covering the following areas:

> a. The process for developing and implementing, by the 1993-94 school year, of a district-wide multi-cultural curriculum, including a general description of how the content of the curriculum shall be developed, the extent of staff training related to curriculum implementation that will be provided, and the means of monitoring the results of implementation and training (see Task Force Report, at p. 15 ¶ 7);
>
> b. The content of, and process for, implementing a comprehensive process of in-service training for staff on a district-wide basis in human relations and instructional strategies that are particularly suitable for diverse student populations, including the method to be used to assess the efficacy of the training and its impact on student outcomes (see Task Force Report, at p. 15 ¶ 8);
>
> c. The anticipated activities and function of, and the process for developing and implementing, the proposed district-wide center for parent education in accordance with the recommendations of the Task Force (see Task Force Report, at p. 15 ¶ 9);

d. The scope and methodology of both the initial race equity needs assessment and the subsequent regular monitoring of equity issues to be carried out by the district, as well as the manner in which the district will utilize the results of these assessments in making any necessary adjustments to, and otherwise facilitating, the successful implementation of the middle school proposal and the desegregation goals of this action (see Task Force Report, at p. 15 ¶ 10);

e. Policies and procedures for assuring that (i) all schools and programs, including those that are geographically located in the "core" or "inner city," are treated on the same basis with respect to assessing and meeting the needs of their pupils; (ii) no schools, programs, or students enrolled therein are penalized in the distribution of resources or in any other manner by virtue of low enrollment or other attributes of the schools or programs during the initial years of implementing the middle school proposal and the Task Force Report; and (iii) all decisions about schools, programs, and personnel are made so as to facilitate the attainment of the goals of the middle school proposal and of this action (see Task Force Report, at pp. 7 ¶¶ 12-15, 15-16 ¶¶ 12-13).

The Court retains jurisdiction over this action to receive the information required above and to enter the further

Orders necessary to effectuate the implementation of the middle school plan consistent with the requirements of the Constitution. To the extent prior Orders are not modified by the terms of this Order, they shall remain in effect.

/S/_____
ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Agreed to:

/s/ _____
WARREN H. DAWSON
14 67 Tampa Park Plaza
Tampa, Florida 33605
(813) 221-1800
JULIUS L. CHAMBERS
NORMAN J. CHACHKIN
99 Hudson Street
New York, New York 10013
(212) 219-1900

Attorneys for Plaintiffs

/s/_____
W. CROSBY FEW
109 North Brush Street, Suite 202
Tampa, Florida 33602
(813) 229-6401

Attorney for Defendants

APPENDIX 5

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 58-3554-CIV-T-17

[Filed October 14, 1997]

ANDREW L. MANNING, et al.,	)
Plaintiffs,	)
	)
vs.	)
	)
THE SCHOOL BOARD OF	)
HILLSBOROUGH COUNTY,	)
FLORIDA (formerly BOARD OF	)
PUBLIC INSTRUCTION OF	)
HILLSBOROUGH COUNTY,	)
FLORIDA), *et al.*,	)
Defendants.	)
	)

PLAINTIFFS' OBJECTIONS TO REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1), plaintiffs hereby respectfully submit the following objections to the *Report and Recommendation* issued in the above-captioned matter:[1]

1. Plaintiffs object to the *Report and Recommendation* finding that the attainment of unitary status is a material change in circumstance sufficient to justify the termination of the 1991 *Consent Order*. *Report and Recommendation,* dated August 26, at 64-65 (hereinafter *"Report and Recommendation")*. Plaintiffs contend that there is no basis for such a finding and that such a finding clearly conflicts with existing law on the modification and/or vacation of consent orders pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Under the Supreme Court's ruling in *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992), there must be a changed factual or legal circumstance, unforeseen by the parties at the time they entered into the agreement, in order to warrant modifying, much less vacating a consent decree. This requirement has not been met and cannot be met here. In a school desegregation case, it is inconceivable that a ruling seeking a declaration of unitary status was unforeseen at the time the parties entered into the 1991 *Consent Order*.

2. Plaintiffs object to the *Report and Recommendation* finding that plaintiffs' *To Enforce Court Order* should be denied. *Id.* at 63-64. For the same reasons that the 1991 *Consent Order* cannot be prematurely modified or vacated, a *Motion To Enforce Court Order* cannot be summarily denied without consideration of all of the potential

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[1] These objections and the underlying basis for these objections are discussed in further detail in the accompanying brief in support of the objections.

issues to be resolved regarding a violation or potential violation of court orders.

3. Plaintiffs object to the *Report and Recommendation* finding that there are no remaining vestiges of the *de jure* segregated school system. *See id.* at 65-84; *see also id.* at 12-57. Plaintiffs contend that there is no basis for a finding that defendants have met their burden and demonstrated that they have eliminated all vestiges of the prior dual system. Such a finding is at odds with the applicable case law.

a. The *Report and Recommendation* should not have found defendants unitary in the area of student assignment. Defendants have not eliminated the vestiges of the prior *de jure* segregated school system to the extent practicable in this area. The *Report and Recommendation* gave insufficient weight to evidence demonstrating that defendants failed to fulfill their affirmative constitutional obligation to desegregate to the extent practicable in the area of student assignment after the issuance of the 1971 *Order*. *See id.* at 15-34, 65-75. Demographic change does not account solely for racial identifiability in the Hillsborough County school system. Demographic change does not account for racial identifiability caused by defendants' failure to perform acts, such as the selection of school sites and the failure to inform parents of the majority-to-minority transfer program. Furthermore, demographic change cannot be fairly attributed to the differences between the projections in population as predicted by defendants and the existing population. There is no reliable evidence concerning this level of demographic

change and even if there was, the 1991 *Consent Order* required defendants to address any such change as part of the *Consent Order*.

b. The *Report and Recommendation* should not have found defendants unitary in the area of faculty and staff assignment. Defendants have not eliminated the vestiges of the prior *de jure* segregated school system to the extent practicable in this area. The *Report and Recommendation's* finding does not address the significant evidence that patterns consistent with *de jure* segregation still exist with respect to this factor. The *Report and Recommendation* finding is not based on an analysis of faculty and staff. *See id.* at 76 (faulting the analysis of Dr. Stevens for including data on staff); *see id.* at 36 (holding that "[n]one of the Court's Orders have ever required the School Board to provide racial balance at the upper management level"). There is no basis in the law for excluding employees, or classes of employees, when evaluating defendants' efforts to address this factor. Under the proper analysis of *both* faculty and staff, the evidence is clear that there are remaining vestiges. Even considering faculty alone, vestiges exist, contrary to a finding that defendants have desegregated to the extent practicable in this area.

c. The *Report and Recommendation* should not have found defendants unitary in the area of facilities. Defendants have not eliminated the vestiges to the extent practicable in this area. Defendants have not provided evidence sufficient to know whether their obligations have been properly discharged. The *Report*

and Recommendation does not adequately take into consideration the lack of evidence explaining defendants' decisions about site selection and the fact that predominantly black schools are more likely to be overcrowded than other schools. *See id.* at 42-44, 79-80. Nor does the record provide evidence sufficient for the Court to conclude that resources with respect to facilities are fairly distributed and provided, irrespective of race. *See id.* at 46-48, 79-80. Indeed, defendants presented no evidence that the vestiges have been eliminated, in comparison to the previous *de jure* school system, so there was no basis for the finding in the *Report and Recommendation* that the vestige of providing facilities in a racially discriminatory manner had been eliminated to the extent practicable.

d. The *Report and Recommendation* should not have found defendants unitary in the area of transportation. Defendants have not eliminated the vestiges to the extent practicable in this area. The *Report and Recommendation* find that the disproportionate transportation burden on black students is not inconsistent with defendants' affirmative constitutional obligations. *See id.* at 39 (finding that plaintiffs had to object before defendants were obligated to do anything about a racially disparate transportation burden). However, there is no discussion about the link between this disparity and the student assignment and site selection policies of the defendants. *See id.* at 37-40, 77-78. Defendants presented evidence which was insufficient to support the *Report and Recommendation's* finding that defendants have ensured that black students who are bused as a result

of defendants' policies have adequate access to extra-curricular activities.

e. The *Report and Recommendation* should not have found defendants unitary in the area of extra-curricular activities. Defendants have not eliminated the vestiges to the extent practicable. The *Report and Recommendation* should not have concluded that the system is unitary with respect to extra-curricular activities, where defendants have not presented evidence sufficiently probative to demonstrate that their burden had been met. *Id.* at 40-42, 77-79.

f. The *Report and Recommendation* should not have found defendants unitary in the area of quality education. Defendants have not eliminated the vestiges to the extent practicable. The *Report and Recommendation* rely on resource allocation data which: (1) fails to address the relationship between the school system today and the prior *de jure* segregated school system, (2) is not sufficiently reliable to be the basis for significant findings of fact and conclusions of law, and (3) relies on two years of data, one of which was described by defendants' own expert as "atypical." *Id.* at 46-48. Given that this data is taken in the midst of a tremendous overhaul of the entire school structure, this information is too unreliable to support a finding of unitary status with respect to this factor. The *Report and Recommendation* rely on evidence of academic outcomes which: (1) does not make a comparison between the current achievement rates of black and white students and the achievement rates of black and white students in the formerly *de jure*

segregated school system, (2) is not measuring the socioeconomic status of actual Hillsborough County public school students, (3) illogically relies on racial data to explain why race is not a factor in the differences in academic outcomes, and (4) does not explain fully the impact of racial discrimination in differences in student performance. *Id.* at 48-57, 82-84. The *Report and Recommendation* do not adequately take into consideration the alarming racial disparities in suspension rates in the Hillsborough County school system.

3. Plaintiffs object to the *Report and Recommendation* finding that defendants have been in good-faith compliance with the Court's 1971 *Order* and the 1991 *Consent Order*. *See id.* at 57-62, 84-86. As a preliminary matter, the *Report and Recommendation* errs in finding defendants in good-faith compliance with an order, the 1991 *Consent Order*, that defendants have not yet fulfilled. The *Report and Recommendation* did not give sufficient weight to the lay testimony presented by plaintiffs, which indicated that not a single black person was willing to testify in favor of unitary status, including the lone black defendant in this case. *See id.* at 84-85 (holding that "opinions and the anecdotal evidence offered by plaintiffs are outweighed" by defendants' evidence). The *Report and Recommendation* also gave insufficient weight to the facts probative of good-faith compliance. First, the defendants exhibited great familiarity with the rules for special transfers, yet claimed to have little understanding that the majority-to-minority transfer program was a viable desegregation option for the school system until nearly 25 years after the entering of the 1971 *Order*. Second, defendants took actions inconsistent with statements made in

Annual Reports filed with the Court, including a promise to take action to address any school with a "race ratio significantly deviat[ing] from the desegregation plan." When asked about the statement at trial, defendants disavowed the statement as representing School Board policy, although it is clearly identified as such in the Annual Reports. Third, defendants claim that critical school desegregation policy decisions were made based on one-time ex *parte* conversations with the Court, which were not memorialized in writing nor explained to plaintiffs, until issues about compliance with this Court's orders arose.

4. Plaintiffs do *not* object to the imposition of a transition phase in this case. *See id.* at 88-89. While the law does not generally allow for such a period, given the existence of a consent order which has not yet been fulfilled and cannot be considered to be complete, such a period will ensure that the remainder of the implementation process for the middle school plan can be monitored and the rights of the plaintiffs adequately protected.

WHEREFORE the reasons stated above and as set forth more fully in the accompanying brief, plaintiffs file these objections and respectfully request that the Court find the *Report and Recommendation* deficient in these respects, not uphold any of the findings of fact and conclusions of law upon which these deficiencies are based, and thus, find that defendants have not eliminated the vestiges of segregation to the extent practicable and to have not been in good-faith compliance with this Court's orders.

Respectfully submitted,

_____

Elaine R. Jones
Director-Counsel

Victor A. Bolden
Jacqueline A. Berrien
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street, 16th Fl.
(212) 219-1900

Attorneys for plaintiffs

Warren Hope Dawson
1467 Tampa Park Plaza
Tampa, Florida 33605
(813) 221-1800
Fla. Bar No. 103926

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 58-3554-CIV-T-17

[Filed October 14, 1997]

ANDREW L. MANNING, et al.,	)
Plaintiffs,	)
	)
vs.	)
	)
THE SCHOOL BOARD OF	)
HILLSBOROUGH COUNTY,	)
FLORIDA (formerly BOARD OF	)
PUBLIC INSTRUCTION OF	)
HILLSBOROUGH COUNTY,	)
FLORIDA), *et al.*,	)
Defendants.	)
	)

BRIEF IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO REPORT AND RECOMMENDATION

Introduction

Plaintiffs, Andrew L. Manning, *et al.*, file this brief in support of the objections made to the Magistrate Judge's *Report and Recommendation* in the above-captioned action.

Plaintiffs have four basic objections to the ultimate findings reached in the *Report and Recommendation,* which also encompass numerous findings of fact and conclusions reached by the Magistrate Judge: (1) attainment of unitary status is not a "material change in circumstance" sufficient to justify the termination of the 1991 *Consent Order,* (2) plaintiffs' *Motion To Enforce Court Order* should not be denied, (3) vestiges of the *de jure* segregated school system remain in the Hillsborough County school system, and (4) defendants have not demonstrated good-faith compliance with this Court's 1971 *Order* and 1991 *Consent Order.* In addition to these objections, plaintiffs do not object to this Court considering the imposition of a transition phase in this case.

Factual and Procedural Background

Plaintiffs filed this action in 1958. It was not until 1971 that any progress toward desegregation began:

> Almost ten years ago this Court found as a matter of fact that prior to and after May 17, 1954, defendants operated, maintained and staffed a completely dual school structure. The school board made no attempt whatever to dismantle the system until September 1961. *In the intervening ten years the defendants have at no time taken any steps which have had the effect of significantly altering the system's racially biased student assignment system.*

1971 *Opinion and Order* at 5-8 [hereinafter "1971 *Order*"] (emphasis supplied). As the Court in its 1971 *Order* stated:

> To obviate any doubt that there is and has been state-compelled segregated schools in Hillsborough County, which this Court and others have previously found and *again, so finds,* this opinion and order will necessarily be in some detail.

Id. at 1 (emphasis supplied). In that *Order,* the Court set forth the scope and nature of relief necessary to ensure the protection of the constitutional rights of the plaintiffs in this case, blacks schoolchildren in the Hillsborough County school system:

> (a) The plan shall have as its primary objective the abolition of segregation in all schools in the county, and in particular it shall aim at desegregation of all schools in the county now having a school population at least 50% black.
>
> (b) In preparing the plan the school board shall begin with the proposition that a white-black ratio of 86%/14% in the senior high schools, 80%/20% in the junior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation.

Id. at 43-44. The 1971 *Order* further obligated defendants to act affirmatively to address segregation and not passively. This Court explicitly rejected the position "that the Constitution does not require integration but only forbids segregation has long been rejected." *Id.* at 43 *(citing United*

States v. Jefferson Board of Education, 372 F.2d 836 (5th Cir. 1966), *aff. en banc,* 380 F.2d 385 (1967)).

In a subsequent order issued on July 2, 1971, this Court specifically retained jurisdiction "for such further action as may be necessary and required." *Opinion and Order,* filed July 2, 1971, at 10 ¶ 1. It was clear that "the school board has a continuing responsibility" to desegregate the public schools of Hillsborough County, Florida. *Id.* The school board has acknowledged as much on occasions, including in July 7, 1972, when defendants submitted to the Court "for consideration and approval" a series of attendance zone boundary changes that the "school Board has adopted ... to continue in compliance with this Court's orders." *Report by Defendant School Board,* filed July 11, 1972, at 1.

Defendants' compliance with Court's order was an issue, even after the 1971 *Order.* On at least one occasion, the Court found it necessary to remind defendants of their continuing obligations under its decrees. On January 14, 1975, having reviewed the previous report of the school board setting out school enrollments as of December 2, 1974, the Court directed the Board:

> to file with the Court on or before March 21, 1975, a supplemental plan designed to insure that the requirements of the Court's previous orders insofar as they relate to Lee Elementary School will be complied with as of the beginning of the 1975-76 school year. In the event the action proposed in said supplemental plan or plans will affect other schools in the system, or changes for other schools are

> required, the nature and extent thereof will be indicated as part of said plan. In this regard the attention of the Board is specifically directed to Cleveland, DeSoto and Gary Elementary Schools respectively.

Order, filed January 14, 1975, at 1 (emphasis supplied).

The Superintendent of the Hillsborough County school system appointed a task force to explore how the school district could establish middle schools, modify and restructure its existing plan for student assignment for that purpose, and *(inter alia)* maintain desegregation. *See Middle School Task Force Report 3,* appended to October 24, 1991 *Consent Order* at 8 ¶ 1.1 [hereinafter *Task Force Report"].* Plaintiffs and defendants subsequently entered into negotiations concerning that long-term restructuring plan. The negotiations resulted in the presentation to the Court of a proposed Consent Order, describing the contemplated conversion of the school district, to a middle school grade organization through a series of modifications of currently existing student assignments. A primary feature of the plan was a cluster system, where "clusters" would be established, consisting of a group of elementary and middle schools and one high school. *Task Force Report,* at 6. The Court subsequently adopted this proposed order. 1991 *Consent Order* [hereinafter, 1991 *Consent Order],* filed October 24, 1991.

The 1991 *Consent Order* modifies, but does not replace the 1971 *Order.* The 1991 *Consent Order* changed the Court's 1971 *Order's* plan with "the operation of single-grade school centers in predominantly black neighborhoods of Hillsborough County," *Consent Order* at 2, to "the creation --

on a uniform basis throughout the district -- of three-grade middle schools and four-year high schools...." *Id.* The agreement recognizes that this change will have a considerable impact on the school desegregation plan currently in place: "Because this change affects not only the curriculum and staffing of school facilities but also patterns of student attendance, it necessarily requires modification of the Court's Orders in this action." *Id.* at 1.

The 1991 *Consent Order* further states that all of the contemplated changes and planning for the proposed change would take seven years to implement. *Id.* at 5. During this seven-year time period, there will be yearly reporting and consultation on the implementation of the plan. *Id. "The* parties shall confer periodically during the period of implementing the middle school proposal and Task Force Report for the purpose of reaching agreement on specific implementation steps." *Id.* Indeed, the 1991 *Consent Order* clearly states that the agreement has to be considered tentative. There can be no clear and final understanding and assessment of the nature of all of the changes and implications of the plan until the seven-year plan has been fully implemented. There are two provisions, clarifying this aspect of the agreement as well as committing the defendants to address problems in implementation arising from the tentative nature of the plan. The first provision reads as follows:

> the parties recognize that the specific attendance proposals contained in Appendix to the Task Force Report are based upon projections and are subject to appropriate modification prior to actual implementation, in order to take account of intervening

> demographic or other changes and in order to carry out the explicitly articulated goals of the program.

Id. at 3 (footnote omitted). The second provision reads as follows:

> The Court recognizes and anticipates that there will be modifications each year of the projected student assignment patterns contained in Appendix 1 to the Task Force Report to take account of demographic or other changes that occur. In making such modifications, the school district should seek to minimize (to the extent practicable) the number of schools which deviate from the system-wide student enrollment ratios (see Task Force Report, at p. 14). The school district shall not implement changes until they have been approved by the Court.

Id. at 5-6. No one will know what the student assignment plan in the Hillsborough County school system will be nor whether the plan will be effective in meeting its constitutional requirements, until at least the completion of this seven-year period in 1998.

The 1991 *Consent Order* further specifies the nature of the Court's continued involvement. It makes clear that the defendants will remain under court jurisdiction until implementation of this plan was completed and that the 1971 *Order* is still in effect:

> The Court retains jurisdiction over this action to receive the information required above and to enter the further Orders necessary to effectuate the implementation of the middle school plan consistent with the requirements of the Constitution. To the extent prior Orders are not modified by the terms of this Order, they shall remain in effect.

Id. at 9.

In 1994, plaintiffs filed an *Amended Motion To Enforce Court Order and Consent Order and For Further Relief* and *Memorandum,* seeking relief under the 1971 and 1991 Orders. Specifically, it was alleged that defendants failed to address racial identifiability in the West Tampa Elementary School, which at the time of the implementation of the "cluster" including the school, had a 48% black population and 15 other schools in the Hillsborough County school system which had a black population of more than 40%. Plaintiffs subsequently filed their *Proposed Findings Of Fact And Conclusions Of Law,* after a hearing on whether the defendants should be required to do more to desegregate the West Tampa Elementary School. *Defendants' Proposed Findings Of Fact And Conclusions Of Law* argued that neither the 1971 nor 1991 Orders placed such obligations on them. Defendants, at no time, argued that the 1991 *Consent Order* should be modified.

The Magistrate Judge's *Report and Recommendation* held that the language in the 1971 *Order* does not "support Plaintiffs' reading of the 1971 Order as imposing an ongoing duty to maintain a particular racial balance once Defendants

have affected compliance with its terms." *Report and Recommendation,* at 14. The *Report and Recommendation* adopted the defendants' view on the scope of the provisions contained in the 1991 *Consent Order*. "The Consent Order clearly provides that in making *modifications* to the projected student attendance patterns, the school district should seek to minimize, to the extent practicable, the number of schools which deviate from the system-wide student enrollment ratios." Plaintiffs objected to the Magistrate's *Report and Recommendation* on the basis that the Magistrate failed to require the defendants to fulfill their affirmative constitutional obligations.

The Magistrate's *Report and Recommendation* expressed concern that there was substantial change in the projections on student enrollment at various schools. *Id.* at 41 ("For example, Robles was projected to have 76% black students and had 90% black students in 1993. Edison (64%) had 74%. Sulphur Springs (59%) had 70%. Oak Park (58%) had 66%. Graham (58%) had 63%. Cleveland (50%) had 59%. Foster (39%) had 57%. Whitter (40%) had 56%, and Van Buren (27%) had 50%."). The *Report and Recommendation* raised the issue of whether the 1991 *Consent Order* should be modified in order to address the ever-growing gap between the defendants' student attendance projections and actual student enrollment, where this gap demonstrated a marked increase in the degree of racial identifiability in the Hillsborough County school system. *Id.* at 41-42.

This Court's *Order Recommitting Matter To Magistrate,* rather than resolving the issue of compliance, recommended instead "that the parties and the Court determine whether the Hillsborough County school system has achieved

unitary status." *Order Recommitting Matter To Magistrate,* at 2. The Court asserted that "uncertainty" about the lack of a finding of unitary status "effectively complicates the analysis of the current controversy and demonstrates the need to expand the scope of the inquiry to a full-fledged determination of whether the Hillsborough County school system has in fact achieved unitary status." *Id.* at 3.

In accordance with this *Order Recommitting Matter To Magistrate,* an evidentiary hearing was held on October 21-25 and on October 28-29, 1996. At the evidentiary hearing, both sides presented lay and expert testimony. Defendants' lay testimony consisted of various school district staff, including the Administrative Assistant to the Superintendent, Dr. John Miliziano; the current Superintendent, Dr. Earl Lennard; several district administration staff members; and current School Board members. Plaintiffs' lay testimony consisted of the named plaintiff, Andrew Manning; parents of the black students currently enrolled in the Hillsborough County school system, Mrs. Mae King and Mr. Darrell Daniels; one student, Ronnie King II; leaders of local civic organizations, Mrs. Joanna Tokley, President of the Tampa Urban League and Mrs. Ann Porter, President of the Tampa branch of the NAACP; a former school system employees, Dr. Sam Horton, Dr. Walter Sickles and Dr. John Heuer; and current School Board members.

To present their expert testimony, defendants called Drs. David Armor and William A. V. Clark. Dr. Armor, a sociologist and currently a research professor at George Mason University in Virginia, has been a consultant for a number of school boards and government agencies on school

desegregation. Tr. III at 3-5.[1] He has worked at the Rand Corporation and for the United States Department of Defense. *Id.* at 5. Dr. Armor has also authored articles and/or conducted studies on school desegregation and academic achievement. *Id.* at 9. He has testified in unitary status hearings in cases, such as DeKalb County, Georgia, Savannah, Georgia, Muscogee County (Columbus), Georgia, Wilmington, Delaware and Dallas, Texas. *Id.* at 11-12. In this case, Dr. Armor analyzed on student assignment, faculty and staff assignment, resource allocation and academic outcomes. *See generally DX 1.* Dr. Clark is a geographer with a Ph.D. from the University of Illinois in Champaign-Urbana and currently a professor at the University of California at Los Angeles. Tr. II at 4-5. He has published in the areas of geography and demography. *Id.* at 5-6. Dr. Clark has testified in unitary status hearings in Norfolk, Virginia *(Riddick v. Norfolk),* Oklahoma City *(Dowell),* DeKalb County, Georgia *(Freeman v. Pitts),* Dallas, Texas (Tasby), Muscogee County, Georgia *(Lockett)* and Kansas City, Missouri *(Jenkins v. Missouri). Id.* at 7. In this case, Dr. Clark has conducted an analysis on the impact of demographic change on the Hillsborough County school system. *See generally DX 2.*

Plaintiffs called Drs. Leonard B. Stevens, Fred Shelley and Robert Crain as experts. Dr. Leonard B. Stevens is an independent consultant on desegregation and other issues related to educational equity, who has worked for school districts, state education agencies, the United States Department of Justice, universities, federally funded desegregation assistance centers and plaintiffs in school

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[1] Citations to the evidentiary hearing transcript will be abbreviated as "Tr. volume # at page."

desegregation cases. *See PX 1* at 35-36. Dr. Stevens also served as a special assistant to the Chancellor of the New York City public school system, and as a federal court monitor for the United States District Court in Cleveland, Ohio for a ten year period. Tr. IV at 110-111. He has provided testimony in five unitary status cases, by court testimony and deposition. *Id.* at 117. These cases are Wilmington, Delaware, St. Louis, Missouri, Muscogee County, Georgia, Midland, Texas and San Jose, California. *Id.* Since 1991, Dr. Stevens has served as an expert to the plaintiffs in this case, which included consultation regarding the 1991 *Consent Order* and an annual review of the annual reports produced pursuant to that *Consent Order*.[2] *Id.* at 118. For this case, Dr. Stevens provided an analysis of the following areas: student assignment, faculty and staff assignment, facilities, transportation, extracurricular activities, suspension rates, gifted education, dropouts and potential remedies. *See generally PX 1.*

Dr. Fred Shelley is a geographer and professor at Southwest Texas State University in San Marcos, Texas. Tr. IV at 22-23. Dr. Shelley's area of expertise is political geography, a field which assesses and identifies the causes of a particular phenomenon in a given geographic area, which includes analysis of demographic information. *See id.* at 27-29. He has written several books and more than 40 articles in his field. *Id.* at 26, 31. He is a member of the Association of

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[2] In the course of work conducted on this case, Dr. Stevens has visited the school district on a dozen occasions, met and consulted with various staff members, visited schools, driven through and around various school attendance zones, and met with parents. *PX 1* at 1.

American Geographers and has received a grant from the National Science Foundation for his work. *Id.* at 30. Dr. Shelley called Plaintiffs as a rebuttal expert to examine the extent to which increases racial imbalance in the Hillsborough County public schools could be attributed to natural demographic change, as alleged by Dr. Clark. *See id.* at 34-36; *see also PX 2.*

Dr. Robert Crain is a professor of sociology and education at Teachers College, Columbia University. Tr. VI at 148. Dr. Crain's area of expertise is research methodology and school desegregation. *Id.* at 150-156. He previously worked at the Rand Corporation and while there, directed the design of an extensive study on school desegregation. *Id.* at 151. He has published five books on school desegregation, on topics ranging containing recommendations on achieving effective desegregation of schools to the effects of racism and segregation on black adults. *Id.* at 152. He has published several articles on research methodology, including a large study on the proper methodology for researching the effects of school desegregation. *Id.* at 152-154; *see also PX 65* (Dr. Crain's curriculum vitae). Dr. Crain has testified in ten to twelve school desegregation cases. *Id.* at 154-155. Dr. Crain testified as a rebuttal expert to the achievement analysis conducted by Dr. Armor. *Id.* at 155-156.

Both parties submitted proposed findings of fact and conclusions of law to Magistrate Judge Jenkins on April 10. On May 22, closing arguments were held before the Magistrate Judge. The Magistrate Judge's *Report and Recommendation* were issued on August 26. *Report and Recommendation,* dated August 26, 1997. The *Report and Recommendation* made four major findings: (1) plaintiffs'

1994 *Motion To Enforce Court Order* should be denied as no violations have been shown, (2) a finding of unitary status is not barred by the 1991 *Consent Order,* (3) there are no remaining vestiges of the *de jure* segregated system, and (4) defendants have complied in good-faith with the Court's orders. *Id.* at 63-90. *The Report and Recommendation* also asked the parties to respond as to whether continued court supervision was necessary for a limited period of time. *Id.* at 88-89. The *Report and Recommendation* ultimately concluded that:

> [T]his Court should find that the defendants have demonstrated that the public school system of Hillsborough County has attained unitary status and should be released from Court supervision pursuant to such further Orders as may be appropriate under the circumstances.

Report and Recommendation at 90.

ARGUMENT

I. PLAINTIFFS OBJECT TO THE *REPORT AND RECOMMENDATION* FINDING THAT ATTAINMENT OF UNITARY STATUS IS A CHANGED CIRCUMSTANCE WARRANTING VACATION OF THE 1991 *CONSENT ORDER*

The *Report and Recommendation* found that: "Attainment of unitary status is a material change in circumstance which could justify termination of court supervision over the School Board." *Report and*

Recommendation at 65. This finding cannot withstand scrutiny under the applicable law. Applying the appropriate standard, the attainment of unitary status could not be a "changed circumstance" warranting modification or vacation of a consent order.

This Court must take into consideration the 1991 *Consent Order* when determining the future scope of court jurisdiction in this case:

> A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in and be enforceable as a judicial decree that is subject to the rules generally applicable to other judgments and decrees.

Rufo v. Inmates Of Suffolk Jail, 502 U.S. 367, 378 (1992). A consent decree "is a final judgment that may be reopened only to the extent that equity requires." *Id.* at 391. While a changed circumstance may be the basis for modifying a consent order, it is not just any changed circumstance which permits a change of the court order. Under the *Rufo* standard, a "changed circumstance" only exists to the extent that such a circumstance was not foreseen at the time of the agreement. A "significant change in factual conditions" cannot be predicated on events actually anticipated at the time of the entering of the decree. *Rufo*, 502 U.S. at 385. There is no evidence -- nor could defendants present any plausible evidence -- that unitary status was an unforeseen circumstance when the parties entered into the 1991 *Consent Order*.

II. PLAINTIFFS OBJECT TO THE *REPORT AND RECOMMENDATION* FINDING THAT DEFENDANTS HAVE ELIMINATED THE VESTIGES OF THE PRIOR *DE JURE* SEGREGATED SCHOOL SYSTEM TO THE EXTENT PRACTICABLE

The *Report and Recommendation* find that defendants have eliminated to the extent practicable the vestiges of the prior *de jure* segregated school system for each of the *Green* factors, student assignment, faculty and staff assignment, facilities, transportation, extracurricular activities, and quality education, another factor now commonplace in a unitary status inquiry.

As a threshold matter, the *Report and Recommendation* does not address the relationships among the many *Green* factors. The significance is that:

> [T]he Green factors may be related or interdependent. Two or more Green factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well.... As a consequence, a continuing violation in one area may need to be addressed by remedies in another.

Freeman, 503 U.S. at 497. Thus, the failure to make these linkages and discuss its impact is problematic. The numerous *Green* factors are inextricably linked to the grade restructuring plan being implemented pursuant to the 1991 *Consent Order.*

See 1991 *Consent Order* at 1 ("Because [the grade restructuring process] affects not only the curriculum and staffing of school facilities but also patterns of student attendance, it necessarily requires modification of the Court's Orders in this action"). Therefore, the absence of any certainty to this plan leaves the status of the *Green* factors in limbo, until at least the full implementation of that plan. Without more, a declaration of unitary status cannot be achieved.

In the area of student assignment, the *Report and Recommendation* find defendants unitary in the area of student assignment:

> On the whole, the School Board has demonstrated that its schools are unitary as to student assignment policies and practices and that the increased black enrollment at about 10% of the schools which are substantially disproportionate to the district-wide racial ratios are due to increased number of black school-age children residing in those neighborhoods.

Report and Recommendation at 75 (citations omitted). In reaching this finding and the findings on the other *Green* factors, the Magistrate Judge shifted the burden of proof from the defendants to the plaintiffs. A prima facie case of having eliminated the vestiges of the prior *de jure* segregated school system is based on whether the plaintiffs ever raised a problem with a *Green* factor, rather than whether defendants have taken steps to eliminate the vestiges. This standard of review, however, has little basis in law.

After this Court's ruling in 1971, the School Board was "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. School Board of New Kent County,* 391 U.S. 430, 437-438 (1968); *see also Freeman v. Pitts,* 503 U.S. 467 (1992); *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 15 (1971); *Jacksonville Branch, NAACP v. Duval Cty. Sch. Bd.,* 883 F.2d 945, 950-51 (11th Cir. 1989). The affirmative obligations of the School Board to desegregate do not end until it has achieved unitary status. *Harris v. Crenshaw County Bd. of Educ.,* 968 F.2d 1090, 1094 (11th Cir. 1992).

The Eleventh Circuit has stated:

> To fulfill this duty, school officials are obligated not only to avoid any official action that has the effect of perpetuating or reestablishing a dual school system, but also to render decisions that further desegregation and help to eliminate the effects of the previous dual school system.

Id. at 1095. The School Board's duty includes considering the construction and abandonment of school facilities, *id.*, and drawing "zone lines so as to affirmatively promote desegregation of racially dual school systems." 1971 *Order* at 26 *(quoting Youngblood v. Board of Public Instruction of Bay County,* 430 F.2d 625, 629 (5th Cir. 1970)). Once a school district is under a court order to desegregate its schools, mere neutrality is not an option. Nor does the responsibility for

determining how defendants should fulfill their obligations rest with the plaintiffs.

This Court made clear in 1971: "Initially it is the duty, not of the Court, not of the plaintiffs, but of the school board acting affirmatively and positively to end segregation in Hillsborough County." 1971 *Order* at 41. Defendants have been on notice long ago that "that the Constitution does not require integration but only forbids segregation has long been rejected." 1971 *Order* at 43 (citing *United States v. Jefferson Board of Education,* 372 F.2d 836 (5th Cir. 1966), *aff. en banc,* 380 F.2d 385 (1967)). The appropriate inquiry is whether defendants have been affirmatively seeking to integrate the Hillsborough County school system in all of the *Green* factors. Given the size of this district, minimal evidence cannot meet the burden. The *Report and Recommendation* finding on the *Green* factors is not based on this standard.

The *Report and Recommendation* failed to address the fact that demographics in Hillsborough County are different from other localities. The change is far less dramatic and more incremental than in *Freeman. See Freeman,* 503 U.S. at 475 ("The school system that the District Court ordered desegregated in 1969 had 5.6% black students; by 1986, the percentage of black students was 47%"). In addition, the identification of pure demographic change is further complicated by the implementation of a middle school plan, which requires considerable change, but where the statistical information on the precise demographic effect will not be discernible until the 2000 Census. Furthermore, given the missed opportunities to desegregate in opening and closing schools, developing magnet schools, administering m-m and special transfer programs and in implementing the middle

school plan, this Court finds defendants' actions contributed to, if not directly caused, racial identifiability in the Hillsborough County school system.

The issue is whether defendants bear any responsibility for the racial identifiability and, if so, the extent to which the defendants are responsible. Defendants have acted, or failed to act, in a number of ways which contributed to racial identifiability of the Hillsborough County Public Schools. First, the school district does not have a working definition of a desegregated school. *Compare* 1994 Evidentiary Hearing Tr. 2 at 145 (testimony of Dr. John Miliziano that 50% black school is racially identifiable) *with* 1994 Evidentiary Hearing Tr. at 260 (testimony of Kenneth Allen, Director of Pupil Administrative Services that a school isn't racially identifiable until 100% black). Second, defendants have admitted that, since the 1977-1978 school year, more than 300 modifications in student assignment have been made to relieve overcrowding, to accommodate the opening of newly constructed facilities, or for other reasons, but *not* for the purpose of affecting the racial ratio of a school. *See PX 1* at 8-9; *see also PX 1b*. The opening and closing of schools created new attendance zones, altered existing attendance zones and required the redeployment of inner-city satellite zones from school to school. *PX 1* at 8-9. These events provided an opportunity to address any racial identifiability in the school system, but such opportunities were not seized upon by defendants. *Id.* at 9. During this time period from 1977-1995, when significant changes in construction and student assignment occurred, the attendance zones of twelve of the fourteen elementary schools on the list of schools very close to, at or more than 20 percentage points above the district-wide black student ratio were changed only once or not at all.

Id. at 9. Nevertheless, under the satellite program, a program overwhelmingly affecting black students, students were redeployed to different schools as the need arose. Tr. I at 102.

Despite the existence of majority black schools since *at least* 1977, as of April 19, 1996, there was not one majority-to-minority (m-m) transfer granted. Tr. I at 91; *see PX 14.* Indeed, there is no evidence (1) that a m-m transfer was ever seriously considered until recently; (2) that defendants understood how to operate a m-m program; or (3) that defendants made any effort to have an effective m-m transfer program. Dr. John Miliziano, the Administrative Assistant to the Superintendent, testified not only that he was unaware of how m-m transfer programs worked in other school districts, but also that he had not read any articles "or anything" about m-m programs. *Id.* at 87-89. The school district first gave out information about m-m transfers on July 18, 1995, nearly twenty years after there were majority black schools. *See id.* at 106. Even today, there are no special affirmative marketing efforts with respect to m-m transfers.

In fact, Dr. Miliziano had to be reminded of the existence of the m-m transfer program and its applicability to majority black schools. This is especially significant because no Hillsborough County school system employee has more extensive school desegregation responsibilities than Dr. Miliziano. *Id.* at 106-107.[3] Dr. Miliziano testified that students

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[3] Dr. Miliziano testified to the following on this matter:

> It wasn't until recently that I, as a person who has spent many, many years in dealing with the court order, maybe it's stupidity on my part, but I didn't

could have applied for a m-m transfer and been denied because the rules for the special assignment program were applied. Tr. I at 92-93. This testimony reveals either a profound lack of understanding or a lack of familiarity with the July 1971 *Order,* which lists rules for all transfers and identifies m-m transfers as the first exception to the transfer rule. *See* July 1971 *Order* at Exhibit 2, page 1. Thus, m-m transfers are special assignment transfers. *See id.*

Magnet schools have been used by districts for desegregation purposes since the 1970s. *PX 1* at 10. The federal government has provided special funds for such schools since the 1980s. *Id.* The Hillsborough County school system did not create its first magnet schools until 1993. *Id.* By 1997, according to defendants' middle school plan, there will be 8 magnet schools and an additional 6 magnet programs within certain schools. *Id.* The Hillsborough County school system's Joint Task Force Report #3 states that magnet schools may have up to a 40% black population in a magnet school. *Joint Task Force Report #3* at 15. This policy would facilitate addressing racial identifiability in zoned schools,

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> even know that this hidden clause -- this clause, not hidden, but this clause in the consent order meant really anything.
>
> It wasn't until recently that it was brought to my attention that, hey, this thing is supposed to be done, and now that you have schools that are 50 percent black or higher, you're supposed to implement this policy.
>
> Tr. I at107.

considerably above the district-wide black student population. *PX 1* at 10.

In practice, black student enrollment at magnet schools is pegged close to the district-wide average. *Id.* at 10-11; *see PX 1c (Appendix).*[4] If the magnet schools were allowed to have a 40% black population, then 394 additional black students would have access to magnet programs. *See Appendix.* Moreover, there is no additional effort made to target black students in high percentage black schools to magnet schools to ameliorate racial identifiability. *Id.* at 11. In 1993, Middleton and Lee Elementary schools opened as magnet schools and are the oldest magnet schools in the district. *Id.* Middleton and Lee have enrollments of 826 and 448 respectively. *Id.* Nevertheless, not one of these schools has ever had more than 5 black students attend a 40% or more black school in the 1995-96 school year. *Id.; see also PX 1d (Appendix),* Tr. IV at 128-129[5].

The Hillsborough County school system is in the process of implementing a middle school plan. *See* Tr. IV at 130-131. In the upcoming 1997-1998 school year, six out of seventeen clusters are to be implemented. *See* Tr. I at 96; *see generally PX 7.* Nine out of the fourteen elementary schools with a greater than 40% black student population are to be implemented in the 1997-1998 school year. *Id.* at 96. While this process has not been completed, it is clear that this plan

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[4] *PX 1c* is incorporated into the appendix attached to this opinion.

[5] *PX 1d* has been added to the appendix attached to this opinion.

has not been effective, in terms of the projections of race ratios for schools having a 40% or more black population. *PX 1* at 14; Tr. IV at 130-131. Furthermore, the middle school plan provided another opportunity to address any racial identifiability in the schools, but, according to current projections, there will be no race ratio relief for any of the elementary schools which have a 40% or more black student population. *Id.* at 14-15.

In fact, during the implementation of the middle school plan, racial identifiability has increased. *Id.* at 15-16; *PX 1e (Appendix)*.[6] Before the middle school plan, there were six schools with a 50% or more black student population. *PX 1e (Appendix)*. The middle school plan projected that, after implementation of the plan, this number would reduce to five. *Id.* By the fall of 1995, the number of schools with a 50% or more black student population doubled to twelve. *Id.* Dr. Miliziano expects that four more schools could be added to the 40% or more black population list, apart from those already on that identified in school district documents. Tr. I at 98.

None of the measures employed by defendants' expert, Dr. David Armor, mitigate the degree of racial identifiability in Hillsborough County elementary schools. Dr. Armor's dissimilarity index does not measure what's going on in an individual school. Tr. III at 135. Since the dissimilarity index provides no information about an individual school, then this measure does not suffice. *Id.* at 135.

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[6] *PX 1e* has been incorporated into the appendix attached to this opinion.

In addition, neither of these measures shed any light as to whether there is any classroom segregation in the Hillsborough County public schools. The exposure index is not intended to detect whether there is segregation in the classroom or if school clubs or activities are integrated. *Id.* Nor do defendants provide data from any other source on the issue of in-school desegregation. Tr. IV at 17.

By Dr. Armor's own exposure index, the average black elementary school student attends a school which is 37% black, thirteen points above the district-wide for black students at the elementary level. Tr. III at 135-136.

Defendants have not put forth any evidence which suggests that addressing the degree of racial identifiability in any of these 17 schools is not practicable. Indeed, the evidence suggests that the middle school plan offers significant opportunities for further desegregation. By comparing PX 7 (chart detailing cluster configurations for the middle school plan from Fifth Annual Report) with *DX 7* (race ratio report for October 30, 1995), it is clear that many elementary schools on the racially identifiable list are in a cluster with non racially identifiable schools.

Edison Elementary School is in a cluster with Morgan Woods (10% black), Town & Country (27% black) and Woodbridge (21% black). *See PX 7* at 2. While Edison is a 75% black school, *DX 7* at 7, the other schools in the cluster, Morgan Woods (10% black), Town & Country (27% black) and Woodbridge (21% black), is well below a 40% black student population. *DX 7* at 14, 20, 22.

Cleveland Elementary School is in a cluster with Carrollwood, Forest Hills and Lake Magdalene. *PX 7* at 2. While Cleveland is 52% black, *DX 7* at 5, the other schools, Carrollwood (15%), Forest Hills (27%), and Lake Magdalene (12%), are well below a 40% black student population. *DX 7* at 4, 8, 10.

Sulphur Springs is in a cluster with Twin Lakes. *PX 7* at 2. While Sulphur Springs is 74% black, Twin Lakes, at 17% black, is well below a 40% black student population. *DX 7* at 18, 20.[7]

Graham and Foster are in a cluster with Broward, Egypt Lake, Mendenhall, and Seminole. *PX 7* at 3. While Graham and Foster have a black student population of 67% and 61% respectively, *DX 7* at 8, 9, Broward (34% black), Egypt Lake (22%), Mendenhall (30%), and Seminole (37% black). *DX 7* at 3, 7, 13, 17.

Robles is in a cluster with Folsom. *PX 7* at 3. While Robles has a 90% black population, *DX 7* at 16, Folsom is only 29% black. *DX 7* at 8.

Cahoon is in a cluster with Hunter's Green Elementary School. *PX 7* at 3. Cahoon is 52% black, but Hunter's Green is only 19% black. *DX 7* at 9.

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[7] Since students who attend Sulphur Springs and Cleveland all attend Adams Middle School, arguably, there is room for more desegregation for Sulphur Springs than just Twin Lakes. *See PX 7* at 2.

Mort, Shaw and Witter are in a cluster with Tampa Palms Elementary School and two other elementary schools to be built after the 1995-1996 school year. *PX 7* at 3. While no data from the 1995-1996 school year is known about the schools slated for future construction, Tampa Palms Elementary School is only 14% black. *DX 7* at 19.[8]

Defendants cannot rely on natural demographic change as an explanation for the increase in racial identifiability in the Hillsborough County school system. Once again, the evidence is to the contrary. The population of Hillsborough County, Florida increased from 490,265 persons in 1970 to 834,054 persons in 1990 according to the United States Census. *PX 2* at 3. While the total population of Hillsborough County grew considerably between 1970 and 1990, the percentage of county residents who are African American remained almost constant between 1970 and 1990. *PX 2* at 3.[9] As defendants' expert acknowledged, "[t]he white and black populations [of Hillsborough County] increased at about the same rate" between 1970 and 1990. *DX 2* at 3.

While there was a slight decline in the percentage of African American Hillsborough County residents between

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[8] While the *Report and Recommendation* states that these clusters are not the schools closest to each other, this analysis misses the point. *Report and Recommendation* at 26-29. The issue is that the clusters are an administrative choice made by the school district, which should be respected. Once that decision is made, defendants are obligated to desegregate to the extent practicable.

[9] African Americans comprised 66,648 of the County's 490,265 residents (or approximately 13.5% of the total county population) in 1970, and 110,283 of the County's 834,054 residents (or approximately 13.2% of the total county population) in 1990.

1970 and 1990, the percentage of persons ages 0-17 who are African American has increased slightly during this period. In 1970, there were 164,278 persons aged 0-17 in Hillsborough County, and 28,527 (or 17.4%) were African American. In 1990, Hillsborough County's total population of persons aged 0-17 was 202,274, and 39,163 (or 19.4%) were African American. *PX 2* at 3.

Despite these minor changes in the percentage of African American residents of Hillsborough County, the number of racially unbalanced[10] public schools in Hillsborough County has increased significantly over the past two decades. *PX 2* at 3, 6. In addition, the percentage of African American students attending racially unbalanced schools has also increased since 1971. *PX 2* at 6. Only 69 percent of Hillsborough County elementary school students attended racially balanced schools in 1995, compared with 97 percent of Hillsborough County elementary school students who attended such schools in 1971. *PX* 2 at 6; *DX 1,* Chart 1. Similarly, the percentage of junior high school students attending racially balanced schools was above 90 percent for all but two years between 1971 and 1988, but has fallen to only 75 percent as of 1995. *PX 2* at 6; *DX 1,* at Chart 2.

Plaintiffs' expert, Dr. Fred M. Shelley of the Department of Geography and Planning, Southwest Texas State University, evaluated whether racial imbalance in the

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[10] Dr. Shelley considered schools with African American student populations above 40 percent to be "racially unbalanced". *PX 2* at 5. As of 1995, 17 Hillsborough County public schools could be identified as racially unbalanced under this definition. *Id.* at 5-6.

Hillsborough County schools can be attributed to natural demographic change in the county. *See generally PX 2.*[11] Defendants' expert witness, Dr. William A.V. Clark, opined that demographic change in Hillsborough County has "made it impracticable or impossible to make further attendance zone adjustments in order to maintain racial balance [i.e., black student enrollments below 40 percent]" in all of Hillsborough's public schools. *DX 2* at 9.[12] Dr. Shelley, who was qualified as an expert in the fields of demography and political geography,[13] concluded that additional factors must be "consider[ed] ... before one can conclude without ambiguity that [racial] imbalance is caused only be natural demographic changes." Shelley, Tr. II at 66.

Half of the boundary changes implemented by the Hillsborough County School Board between 1977 and 1995 maintained or exacerbated racial imbalance in the Hillsborough County schools. Tr. IV at 41-42; *PX 2; PX 4.* Dr. Shelley analyzed the changes in attendance boundaries, as

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[11] *See also* Tr. II at 34-35 ("I was retained to consider the question of the extent to which increases in identifiable racial imbalance in the public schools in Hillsborough County could be attributed to natural demographic change").

[12] On cross-examination, Dr. Clark admitted that he has never testified in a unitary status proceeding for any party other than a school system or school board seeking unitary status, Tr. II at 71. Dr. Clark also admitted that his conclusion in unitary status proceedings concerning the DeKalb County, Georgia; Muscogee County, Georgia; Oklahoma City; Oklahoma; and Dallas, Texas public school systems was, in every case, that demographic change was a greater factor than any action or omission by school officials. *Id.* at 65-72.

[13] Tr. Vol. II, at 34.

reported in the Race Ratio Trends reports produced by the Hillsborough County School Board *(PX 4)*, for 17 Hillsborough County schools which have more than 40 percent African American student enrollments.[14] Dr. Shelley was thus able to determine whether boundary changes implemented by the School Board between 1977 and 1995 in these 17 schools resulted in an increase or decrease in the African American student enrollment of those schools. Tr. IV at 38-39; *PX 2* at 20. For purposes of this analysis, Dr. Shelley considered changes in the boundaries of the school attendance areas for the 17 racially identifiable schools which occurred between 1977 and 1995, as reported by the Hillsborough County School Board in the Race Ratio Trends Report. Tr. IV at 38-39, 42; *PX 2*, at 1, 9, 20.

According to Dr. Shelley, only 16 of the 32 boundary changes implemented by the defendants in the 17 racially unbalanced schools between 1977 and 1995 had the effect of alleviating racial imbalance. Tr. IV at 41-42. Dr. Shelley found that only one of three boundary changes implemented for Cahoon elementary school alleviated racial imbalance in that school. Tr. IV at 39; *PX* 2 at 20. Only two of the four boundary changes implemented for the Clair Mel and Witter schools, respectively, alleviated racial imbalance in those schools. Tr. IV at 40-41; *PX 2* at 20. The boundaries for De Soto, Edison, and Sulphur Spring schools each changed one time during the relevant period, and the change did not reduce

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[14] The 17 schools included in Dr. Shelley's analysis were Cahoon, Clair Mel, Cleveland, DeSoto, Edison, Foster, Graham, Mort, Oak Park, Robles, Shaw, Sulphur Springs, West Tampa, and Witter elementary schools, and Dowdell, Sligh, and Van Buren junior high schools. *PX 2* at 5-6.

racial imbalance in any of the three schools. Tr. IV at 40-41; *PX 2* at 20. Only two of the five boundary changes implemented for Mort elementary school alleviated racial imbalance in the student population of the school. Tr. IV at 40; *PX 2* at 20. Shaw Elementary and Dowdell Junior High Schools each had two boundary changes during the relevant period, and Dr. Shelley found that only one of the changes for each school reduced the racial imbalance of their student enrollments. Tr. IV at 41; *PX 2* at 20. Only one of the three boundary changes implemented for Van Buren reduced the racial imbalance of the school. Tr. IV at 41; *PX2* at 20. In only four of 17 schools -- Cleveland, Graham, Oak Park, and Sligh -- did all of the boundary changes implemented by the defendants reduce racial imbalance. Tr. IV at pages 40-41 and *PX* 2 at 20.

Special assignments of students to the Hillsborough County schools have had the effect of disproportionately increasing the percentage of African-American children attending racially imbalanced schools. Tr. IV at 37; *PX 2* at 10-11, 21. Dr. Shelley analyzed data included in the Fifth Annual Report of the Hillsborough County Schools concerning student special assignments *(PX* 6), and determined that "[s]pecial assignments had little impact on race ratios in a large majority of Hillsborough County elementary schools." *PX 2* at 10. The exceptions to this rule, however, were the schools with African American student populations in excess of 40 percent.

"The result of special assignments as practiced [in Hillsborough County] has been an increase in African-American percentages in schools that are already unbalanced." *PX* 2 at 11. Seven of the nine schools (or approximately 77

percent) were among the 17 racially identifiable Hillsborough County schools. Tr. IV at 44-46; *PX 2* at 10-11, 21; *PX* 6. "In each case, the impact of special assignment was to increase that school's African-American student percentage." *PX2* at 10. Defendants did not rebut this testimony by Dr. Shelley.

Plaintiffs demonstrated that racially imbalanced schools are far more likely than other schools to be overcrowded in relation to their Florida Inventory of Schoolhouse ("FISH") capacities. Tr. IV at 37, 46-50; *PX 2* at 11-13, 22-23. Every elementary school with an African American student population of 40 percent or more currently exceeds its FISH capacity. Tr. IV at 49-50; *PX 2* at 12, 22. Ten of fourteen racially identifiable elementary schools -- or 71 percent of such schools -- had enrollments 25 percent above FISH capacity in 1995/96. Shelley Tr. IV at 48-49; *PX 2* at 12, 22-23. By comparison in the same year, only 24 percent of the racially balanced elementary schools (21 of 88) had enrollments 25 percent or more above their FISH capacities. Shelley Tr. IV at 49; *PX 2* at 22-23. Therefore, "although less than 14 percent of all elementary schools in Hillsborough County were overcrowded" more than one-third of the County's overcrowded schools in the 1995-96 school year were racially unbalanced schools. *PX 2* at 13.

The most striking example of the relationship between racial imbalance and overcrowding in Hillsborough County is Edison Elementary School, which currently has an actual student enrollment 84 percent above the FISH capacity of the school. Tr. IV at 50; *PX 2* at 13. In 1977-78, when Edison's enrollment was almost evenly divided between Black and white students, the school was about 11 percent above its FISH capacity. *PX 2* at 13. By the 1995-96 school year, the

percentage of African American students enrolled at Edison had risen to 77 percent, and the school was more than 83 percent above its FISH capacity by 1995-96. *PX 2* at 13.

Defendants' expert, Dr. William A.V. Clark, did not study whether there were differences between the enrollment density of the racially imbalanced schools in the Hillsborough County school system and other Hillsborough County schools. Tr. II, at 87. Consequently, Dr. Shelley's findings concerning the overcrowding of racially imbalanced schools were not rebutted by the defendants.

Dr. Shelley found a wide variation between the percentage of African American children residing in the attendance areas of the 17 racially identifiable schools in Hillsborough County and the African American student enrollment of these schools. Tr. IV at 50-56; *PX 2* at 14-16, 24-25. Dr. Shelley also found that there was a dramatic increase in the range of disparities between the percentage of African American children residing in these attendance areas and the African American student enrollment of these schools. Tr. IV at 57-58; *PX 2* at 24-25. According to Dr. Shelley, "disparities between the percentage of African-Americans in schools and those in the general population [of the school's attendance zone] should, be consistent across schools at any given point in time absent, clear evidence that birth rates or other factors affecting the overall population differs substantially from one place to another." *PX 2* at 15.

The inconsistent pattern of disparities between school enrollment and surrounding attendance zones suggests that natural demographic change does not fully account for the increasing racial imbalance of the Hillsborough County

schools. *PX 2* at 16. Immediately after the 1971 Order took effect, the disparity between the African American population 0-17 years of age in the attendance areas of the subject schools and the enrollment of those schools ranged from 10 to 17 percent. By 1980, the disparity ranged from four to 24 percent, and by 1990, the disparity ranged from -1.5 percent to 28 percent. Tr. IV at 57-58; *PX 2* at 15-16, 24-25. Dr. Shelley concluded that it was difficult to attribute this degree of disparity solely to natural demographic change. Tr. IV at 56; *PX 2* at 16, 24-25.[15]

Hillsborough County is less racially segregated today than it was in 1970. Tr. IV at 59-60. The number of Census tracts with African American populations of 95 percent or more fell from seven in 1970 to two in 1990. Tr. IV at 61; *PX 2* at 18. At the same time, the number of Census tracts with 25 to 50 percent African American population more than doubled between 1970 and 1990. *Id.* at 61, lines 14-16; *PX 2* at 18.

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[15] Dr. Clark testified that "the most obvious" explanation for a disparity between the racial composition of the school-age population of an attendance zone and the actual school enrollment "is that some of the white children who are living in there ... are going to parochial or private schools." Tr. Vol. II, at 55 (Clark). *See also id.* at 45 ("[I]n general we might expect the black enrollment to be higher than the proportion in the neighborhood because [of], for example, children going to parochial and private schools"). Dr. Clark admitted, however, that he does not "know the degree of the impact" of private or parochial school enrollments upon the disparity between attendance zone populations and school enrollments, and he did not conduct an analysis which would allow him to quantify or estimate this impact. Tr. Vol. II at 88-89 (Clark). Consequently, Dr. Clark's opinion on this matter should be accorded little or no weight.

The attendance areas for Cleveland, Edison, Graham, Robles, and Oak Park elementary schools are not adjacent to each another. Rather, these attendance areas are geographically dispersed. Tr. IV at 62-63; *PX 2* at 18-19.

Based upon the degree of racial integration of Hillsborough County's residential areas, the relatively small growth of the African American population (including the school-aged population) county wide, and the dispersion of the attendance zones of the five elementary schools with the longest history of student enrollments above 40 percent African American, Dr. Shelley concluded that boundary adjustments may be able to alleviate the racial imbalance of these schools. Tr. IV at 58-64; *PX 2* at 18-19.

There is no empirical support for Dr. Clark's conclusion that the Hillsborough County School Board could not have undertaken additional efforts to counteract the impact of demographic change on the racial composition of the schools. Tr. II at 60-64. While Dr. Clark referred to an analysis of "white flight" which he performed in another case during his trial testimony, *id.* at 63-64, he conceded that he did *not* conduct such an analysis in this case. *Id.* at 97. Thus, Dr. Clark's opinion that further adjustment of attendance zone boundaries by the Hillsborough County School Board would have deleterious effects system wide is entitled to no weight.

Even Dr. Clark concedes that there is no available data which would permit assessment of demographic change after 1990. Tr. II at 14. Therefore, the impact of the various changes made pursuant to the 1991 *Consent Order* cannot be adequately measured for two reasons. First of all, nine of the racially identifiable schools have not come on line yet. Tr. I

at 96. Second, the extent of demographic change cannot be determined until after the census in the year 2000. While the unavailability of updated population data would not ordinarily be given consideration in a school desegregation case, such consideration is appropriate here, given the massive change in the student assignment system undertaken by the defendants since 1991.

The *Report and Recommendation* find defendants unitary in the area of faculty and staff assignment. The evidence suggests defendants have not eliminated the vestiges in this area. The July 1971 *Order* states that:

> Principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for black students or white students. Such personnel shall be assigned so that the ratio of black to white teachers in each school, and ratio of other staff in each are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.

July 1971 *Order* at 10. This provision of the *Order* contemplates the inclusion of faculty and staff in the analysis and staff assignment is expressly listed as a *Green* factor. *See Green,* 391 U.S. at 435. The evidence on staff deemed unreliable in the *Report and Recommendation* is a critical component of desegregation orders in general and this desegregation order in particular.

The *Report and Recommendation* do not address the fact there is a discernible racial pattern which prevails in the case of schools with the higher percentages of black faculty and staff. Without exception, these schools have one of three categories: (1) a high percentage of black student enrollment, (2) a historically black school prior to the 1971 *Order*, or (3) a school located in the "inner city." *See PX 1i (Appendix)*[16]. All of these schools have a 10% or more deviation from the district-wide faculty and staff average. *Id.* Many of these schools have a 15% or more deviation from the district-wide faculty and staff average.

The *Report and Recommendation* do address the evidence that, at the highest ranks of the Hillsborough County school system's hierarchy, blacks have been shut out of key policy-making positions.[17] However, this evidence is dismissed as not relevant to the inquiry at hand. *See Report*

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[16] *PX 1i* is included in the appendix to *Plaintiffs' Proposed Findings of Fact and Conclusions of Law*.

[17] No black person has ever served as Superintendent, Deputy Superintendent, Assistant Superintendent for Instruction, Assistant Superintendent for Administration and Operations, and Assistant Superintendent for Personnel and Human Resources, Assistant Superintendent for Business and Research, Assistant Superintendent for Vocational, Technical, Adult and Community Education or as Administrative Assistant to the Superintendent in the Hillsborough County school system. Tr. VII at 144-145. One Assistant Superintendent position -- and only one -- has ever been held by someone black: the position of Assistant Superintendent for Supportive Services. Tr. VII at 145-147; *see also* Tr. VI at 88-89. This position administers federal programs relating to inner-city school projects and the human relations program. Tr. VI at 88-89. However, none of the black persons who have served in this position have ever had the opportunity to serve in any other Assistant Superintendent capacity. Tr. VII at 146-147.

and Recommendation at 36 ("None of the Court's Orders have ever required the School Board to provide racial balance at the upper management level"). Thus, the *Report and Recommendation* deem irrelevant evidence probative of the district's treatment of staff and willingness to integrate the Hillsborough County school system at every level, contrary to the Supreme Court's commandment. *See Green,* 391 U.S. at 435 (obligation to ensure that "every facet of schools operation" is free of racial identifiability).

The *Report and Recommendation* find that defendants are unitary with respect to facilities. The legal analysis undertaken by the Court does not adequately consider the July 1971 *Order*. The Court recognized in its May 1971 *Order* that the area of facilities is a critical one:

> The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote

> segregated residential patterns, which when combined with "neighborhood zoning," further lock the school system into a mod [sic] of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

May 1971 *Order* at 31 *(quoting Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, 402 U.S. 1, 20-21 (1971). The Court provided clear direction as to how to determine compliance with this factor:

> As previously ordered all school construction, school consolidation and site selection, (including the location of any temporary classrooms) in the system shall be done in a manner which will prevent the recurrence of the dual school structure.

July 1971 *Order* at 11. Nevertheless, the *Report and Recommendation* do not base its finding on whether defendants can satisfy its burden, given the information it submitted, there is enough information the extent adequate information was presented to permit evaluation of motivations for defendants' actions, as well as the extent to which desegregation was taken into consideration, defendants' site selection policies and practices suggest that the placement and construction of new facilities have exacerbated racial identifiability. *See id.* at 42-44, 79-80.

Plaintiffs' expert, Dr. Stevens, did not find any district documentation of any of the following: reason a school site was selected, a summary analysis of the impact of a selected

site on desegregation, alternative sites considered and rejected and reasons for rejection, including consideration of alternative sites' impact on desegregation. *PX 1* at 19. Nor did defendants have not presented any information to the contrary. It is clear from the school district's own data that the closing and opening of schools did not address racial identifiability. From 1977-1995, 24 elementary schools were opened and 8 elementary schools were closed. *PX 1b; see also PX 1* at 8. Yet, during this same time period, there were 14 elementary schools which had a black population of 40% or more black. *PX 1* at 7. None of the 14 racially identifiable schools were further desegregated as a result of the opening and closing of schools. *Id.*

Furthermore, there are serious questions as to whether school site selection in Hillsborough County has exacerbated any existing segregated residential patterns and hindered further desegregation. *See PX 1* at 8-10; *see also PX 1* at 18-19. Rather than simply forgoing opportunities for further desegregation, defendants have actively promoted segregation. With few exceptions, defendants have opened new schools outside areas where there are concentrations of black students. *PX 1* at 18. Dr. William A.V. Clark, the demographer retained by the Hillsborough County School Board, acknowledged that the defendants' decision to construct a new school "in the far part of the suburbs ... would suggest they [defendants] were less concerned about keeping an integrated school system" than if defendants decided to build a school in "the center city." Tr. II at 85-86. As a consequence of this action, defendants rely on students from the satellite zones as the primary means of desegregating these schools. *Id.* Thus, the only reason that defendants can state that they have never opened a school with an all-white population is related to their

readiness to dispatch satellite students to any school built in a nearly all-white geographic area. The end result of this practice is to increase the transportation burden on these students, the vast majority of whom are black. *Id.*

Moreover, site selection in predominantly, if not exclusively, white neighborhoods, is not the only concern with regard to school construction. There is evidence that schools 20 percentage points or more above the district-wide black population are more likely to be overcrowded than other Hillsborough County schools. Dr. Shelley presented evidence that overcrowding in schools with a 40% or more black population persisted and was not likely to be addressed by new construction or the reassignment of students. *PX 2 at* 12. In the 1977-1978 school year, there were 83 elementary schools in Hillsborough County; four of these schools, Cleveland, Edison, Graham and Oak Park, had 40% or more black student populations *Id.* Two out of these four schools, Graham and Oak Park, had enrollments of more than 25% above its Florida Inventory of School Houses (FISH) capacities. *Id.; see also id.* at 23. Of the 79 schools which had a black population of less than 40% black, only six schools had enrollments of more than 25% above FISH capacity. *Id.; see also id.* at 23. In the 1995-1996 school year, out of a total of 102 elementary schools, there are fourteen elementary schools with a 40% or more black population. *Id.* The vast majority of these 40% or more black student schools -- ten -- are overcrowded, with half of the ten schools being more than 50% above FISH capacity. *Id.* at 12-13; *see also id.* at 23. Of the 88 elementary schools with less than 40% black student population, only 21 were overcrowded, with little more than one-third of the twenty-one being more than 50% above FISH capacity. *Id.* at 12-13; *see also id.* at 23. In essence, although only 14% of all

elementary schools in Hillsborough County can be considered to be overcrowded, according to FISH capacity, more than one-third of those schools with a 40% or more black student population are overcrowded. *Id.* at 13; *see also id.* at 23.

Defendants failed to provide pertinent data necessary to meet their burden of demonstrating that the system has been successfully rid of all vestiges of discrimination to the extent practicable. For example, one indication of whether the school district discharged its obligation relating to the satisfaction of the *Green* factor of facilities would certainly be data on capital expenditures. As part of an overall analysis on resource allocation, Defendant has included an analysis on capital expenditures. *See DX 1* at 19-20. This information is deficient in two respects. First, this information does not do an analysis of data on capital expenditures prior to the 1971 *Order,* failing to provide a suitable benchmark for this Court to determine whether there has been a significant change in the treatment of schools predominated by black students. Tr. III at 129. Second, while defendants' expert, Dr. Armor, conducted an analysis between "inner city" schools and other schools, Dr. Armor did not compare capital expenditures between schools with a greater or less than 40% black student population. Tr. III at 131. In fact, an overwhelming number of the schools included in the capital expenditure study -- eleven[18] out of twenty-one elementary schools -- are schools which are not

[18] The eleven schools are Bryan Tampa, Dunbar, Just, Lee, Lomax, Orange Grove, Potter, Progress Village, Shore, Williams, and Lincoln.

close to or a majority black. *Id.* Indeed, some of these schools are magnet schools.[19]

The *Report and Recommendation* made a finding that the defendants are unitary in the area of transportation. This finding is based on the fact that the bus burden has existed since the 1971 *Order* and was not considered a violation then.[20] *See Report and Recommendation* at 39. This analysis does not take into account whether since the entering of the 1971 *Order* there is still a need for blacks to bear *such* a disproportionate burden of the busing under the school system's desegregation plan.[21] Nor does this address whether

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[19] The significance of placing magnet schools on the list is two-fold. First, magnet schools in the Hillsborough County school system receive additional resources, as the defendants readily concede. *See* Tr. I at 151-153. Second, magnet schools at Hillsborough County expressly limit black student enrollment to no more than 23%. *See id.* at 166-167; Tr. IV at 126.

[20] The July 1971 *Order* did state that:

> Bus routes and the assignment of students to buses will be designed to assure the transportation of all eligible students on a non-segregated and otherwise non-discriminatory basis....

July *Order* at 10.

[21] Recent data indicate that, at the high school level mean, a black student is three times more likely than a white student to be bused for desegregation purposes. See *PX 1* at 20; *see also PX If.* When the figures computing which students are bused for desegregation purposes, but do not do so voluntarily, i.e., they are not participating in a magnet school or program, black students are still more likely than white students to be "assigned" to a bus for desegregation purposes. *See id. PX 1; see also PX 1g.* At the elementary school level, black students are nearly two and one-half

there is a link between the student assignment and site selection policies of the defendants which are a contributing factor to the burden placed on black students. For example, the perpetuation of the satellite program places a disproportionate transportation burden on black students who live in the satellite areas. The logic behind the *Report and Recommendation's* finding suggests that black students can be bused at will.

The *Report and Recommendation* found the defendants unitary in the area of extracurricular activities. *Report and Recommendation* at 40-42, 77-79. The July 1971 *Order* required defendants to assure access to, and the maintenance of, extracurricular activities on a "non-segregated" and "nondiscriminatory" basis. Defendants provided little evidence to justify such a finding and the *Report and Recommendation* provides little basis for reaching this result.

In order to form an opinion as to the degree of desegregation of extracurricular activities, the following information would have to be provided: (1) activities by school, (2) sponsors and coaches by school and by race, (3) student participation by activity, by race and by school. *PX 1* at 28. These activities should include athletics, clubs and other

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times more likely than white students to be assigned to a bus for desegregation purposes. *See id.; see also PX 1g*. At the high school level, black students are fourteen times as likely as white students to be assigned to a bus for desegregation purposes. *See id.; see also PX 1g*. There is marked increase in terms of the percentage of students assigned to a bus for desegregation purposes at the high school level. At the high school level, black students comprise nearly 80% of the students bused for desegregation purposes. *See id.; see also PX 1g*.

after-school activities. *Id.* The availability of transportation to and from these activities should also be examined.[22]

The Hillsborough County school system apparently has a broad range of extracurricular activities, including athletics, music groups (such as bands, orchestras, and choral groups, student organizations (such as the National Honor Society, drama clubs and the student council). *See PX 1* at 27; *see also* Tr. VI at 29-30. At the evidentiary hearing, defendants only presented evidence with regard to athletics. *See* Tr. I at 111-116; *see also DX 28.* Therefore, there is no basis for concluding that there are no vestiges of segregation with respect to music groups, student organizations and other clubs in the Hillsborough County school system, especially in light of compelling anecdotal testimony about a reluctance in one predominantly white school to do more about black student involvement in extracurricular activities. Tr. VI at 17-22, 27-28.[23]

The evidence with respect to athletics, which includes sports and cheerleading, is limited to one exhibit. *DX 28.* This

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[22] As discussed above, this Court has already found that defendants have failed to show that there is adequate access to extra-curricular activities for those students -- who are disproportionately black -- who are bused to school from a satellite area.

[23] A black parent, Mrs. Mae King, testified that, when she made a suggestion about having an African-American disc jockey at a party to increase black student participation in school activities, parents walked out of the meeting. *Id.* at 19-20; *see also id.* at 52-53 (testimony of Ronnie King concerning limited involvement in and recruitment of black students for Spanish and Math Honor Societies).

exhibit provides information for the fall of 1996-1997 school year and the winter and springs of the 1995-1996 school year. Tr. I at 117. The exhibit does not provide any information prior to this time period. *Id.* at 117-118. Nor does the exhibit indicate how many students tried out for the given activity. *See id.; see DX 28.* Therefore, it is impossible to tell whether or not any of the figures represent a pattern of discrimination or exclusion. For example, for the Bloomingdale High School, there were no black cheerleaders during this time period. *Id.* at 117-118. There is no evidence that this is aberrational or that it reflects a lack of interest on the part of black girls. *See id.* at 117-118. Likewise, at Brandon High School, there was only one black cheerleader. *Id.* at 118. Again, there is no indication from this exhibit whether this is aberrational or rather, reflects a pattern of discrimination. Such information is crucial to determining whether the vestiges of segregation have been eliminated.[24] Thus, the *Report and Recommendation* should have found that defendants failed to present sufficient evidence that extracurricular activities are free of the vestiges of segregation.

The inquiry of whether a quality education has been provided, regardless of the race of the student, focuses on factors related to the prior *de jure* segregated school system. *See Missouri v. Jenkins*, 515 U.S. at ___, 132 L.Ed. 2d at 89 (Court expresses concern about "[i]nsistence upon academic goals unrelated to the effects of legal segregation"). If any so-

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[24] Clearly, black students' opportunity to participate in cheerleading squads has been an issue throughout the school district. The issue is of such great concern that Mrs. King, testified that she got up early in the morning to monitor cheerleading tryouts at Armwood High School. Tr. VI at 26-27, 31-32.

called "external factors" affecting minority student achievement are the result of segregation, then these factors are relevant and "figure in the remedial calculus." *Id.* Testimony on quality education is in three forms: (1) evidence on resource allocation, (2) evidence on academic outcomes, and (3) evidence on the disparate impact of defendants' practices and policies affecting a student's right to a quality education, regardless of race.

On resource allocation, defendants submitted an analysis compiled by Dr. Armor. Dr. Armor conducted analyses on teacher resources, operational resources and capital expenditures. *DX 1* at 14-20. The *Report and Recommendation* found that:

> The School Board has also established that its allocation of funds and teacher resources is free from racial discrimination. Much of the budget comes from state and federal sources and the School Board is regularly audited to determine that it is in compliance with standards for use of those funds. Individual schools are funded on a per-pupil basis and the race of the student has no bearing on how funds are spent. Schools that are brought into the middle school cluster plan receive additional funds for that year. In recent years, total per capita expenditures have actually been higher at schools with a 40% or higher black enrollment.

Report and Recommendation at 79. The evidence upon which this finding is based cannot support such a conclusion.

Overall, the data on resource allocation is so deficient that it is of little probative value. This data suffers from three major deficiencies: (1) none of the data provided hereto is compared with information prior to the issuance of the 1971 *Order*, (2) only two years of data are provided and not consecutive years and (3) the analysis does not take into consideration the impact of the middle school plan. On the first matter, there can be no meaningful discussion of "vestiges" without a proper understanding of the prior *de jure* segregated school system. On the second, the quantum of data provided must be sufficiently reliable in order for this Court to provide meaningful findings of fact and issue well-informed conclusions of law. On the third and final matter, if as the defendants' expert concludes, one of the two years chosen was an atypical year, *DX 1* at 14, this fact raises a question about whether any of this data can be reliable in the midst of a tremendous overhaul of the entire school structure, as a result of the ongoing implementation of the middle school plan.

The teachers' resources information contains data on the following with respect to elementary and middle schools, not high schools: (1) the educational background of teachers, (2) the average years of professional experience for teachers in a school, and (3) pupil teacher ratios. *DX 1* at 14-15. However, the teachers' resource information includes resources, provided as a result of Chapter I funds. Chapter I funds bring significant resources based on the socioeconomic status of the students. *See* Tr. VII at 93-95. Therefore, the use of resources provided by these sources without an indication of how this support affects the amount of resources can be misleading and not a sufficiently reliable indicator of how the school district, itself, is distributing resources.

The operational expenditure analysis includes information on teacher salaries and benefits, textbooks, instructional equipment, maintenance and other categories. *DX 1* at 16-19. As a result of the use of only two years of data, a dozen schools were excluded from the analysis on supplies and equipment expenditures.[25] It is unclear what the impact is of this exclusion of data. Nevertheless, defendants chose to present a limited sample from which this Court could make findings and thus, cannot complain about their inconclusiveness.

On academic outcomes, the *Report and Recommendation* found that: "any disparity in achievement among students is not due to the effects of the prior segregated school system but rather to a myriad of other factors, largely socioeconomic." *Report and Recommendation* at 82-83. This finding is not supported by the evidence presented in this case. On academic outcomes, defendants once again rely principally on the testimony presented by Dr. Armor. Despite the existence of these disparities in student achievement between black and white students, Dr. Armor suggests that these results have no connection with the prior *de jure* segregated school system, even though Dr. Armor's analysis does not compare the current achievement rates of black and white students with the achievement rates of black and white students in the former *de jure* segregated school system. Tr. III at 119-120. The sum and substance of Dr. Armor's testimony are that the difference between white and black

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[25] The elementary schools are Boyette Springs, Cannella, Colson, Folsom, Hunters Green Lithia Springs, Lowry, and Schwartzkopf. *DX 1* at 18, n.7. The middle schools are Coleman, Madison, Monroe, and Wilson. *Id.*

student achievement levels is "explained" almost entirely by the poverty of the students, rather than "vestiges" of the prior *de jure* segregated school system. For the reasons stated below, this additional analysis is not compelling. Dr. Armor does not analyze any information from the prior *de jure* segregated school system. Thus, this analysis draws a conclusion without complete information. This analysis cannot inform the Court on how differences in teacher expectations affected black student achievement prior to the 1971 *Order*. *Id.* at 121. Nor can this analysis preclude the possibility that part of the gap in black/white achievement explained by percentage B.A. is related to the prior *de jure* segregated school system. *Id.* at 123. If part of the gap in black/white achievement is explained by the percentage of B.A. in black families, which is related to the prior *de jure* segregated school system, then this would help explain the impact on average household income. *Id.* at 123. Thus, Dr. Armor does not account for the possibility that the differences between the academic outcomes of black and white students may be linked to the prior *de jure* segregated school system. While Dr. Armor suggests, such an inquiry is not relevant, *Id.* at 121, to conclude otherwise requires the Court to do something it cannot do: ignore the very basis for federal court supervision in the first place.

Next, Dr. Armor's use of 1990 United States Census variables, same-race percentage of B.A. degrees and the same-race average household income, with actual school data, free or reduced lunch status and one- or two-parent family status, renders suspect his analysis of the impact of socioeconomic status of the 1994 and 1995 fifth and eighth grade reading and math test-takers. First, the U.S. Census data measures the socioeconomic status of neighborhoods, not actual students.

Tr. III at 125-126; Tr. VI at 170. Second, Dr. Armor is not even measuring the socioeconomic status of the actual neighborhoods of the 1994 and 1995 fifth and eighth grade reading and math test-takers, because he relies on information from 1990, the 1990 Census, not information from 1994 and 1995. Thus, Dr. Armor is not measuring the socioeconomic status of the 1994 and *1995* test-takers.

Finally, the use of the Census data taints Dr. Armor's conclusions in another way. Dr. Armor claims to be trying to explain whether something other than race "explains" differences in test scores between black and white students. However, by using only same-race data from the U.S. Census, he is using racial data to explain away race. Tr. VI at 170-173.[26]

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[26] In his analysis of whether socioeconomic status can "explain" the racial gap in test scores, Dr. Armor also inappropriately assumed that the relationship between socioeconomic status and academic achievement is the same for black and white school children. Tr. VI at 176-177. This assumption had the effect of overestimating the effects of socio-economic status. *Id.* at 177-78. In fact, as plaintiffs' rebuttal expert, Dr. Robert Crain showed, although academic achievement generally increases with the level of family resources for both white and black students, the relationship between the level of family resources and achievement is not the same for black students versus for white students. PX 65; Tr. VI at 181-82. In fact, when blacks of low family resources are compared to whites of low family resources or blacks of high family resources are compared to whites of high family resources, there are differences in academic achievement levels, with whites scoring higher than blacks. *See id.* Dr. Armor had not himself analyzed the significance of the difference between these relationships and thus had no basis to conclude that the difference was not significant. Tr VII at 177, 179-80.

For Dr. Armor's analysis to have its intended effect -- to prove that any differences in academic outcomes between black and white students are related solely to socioeconomic factors rather than race -- first grade test scores are critical. Tr. VII at 182-183. As discussed above and conceded by Dr. Armor, the use of the four socioeconomic variables, percentage of B.A. degrees, average household income, free or reduced lunch status, and one or two parent family information, "only explain about half of the difference" between the academic outcomes of black and white students. *Id.* at 183. Thus, in Dr. Armor's own words, "first grade scores are critical in my opinion." *Id.*

Like the inclusion of the neighborhood variables, the addition of first grade test scores to Dr. Armor's analysis compromises the quality of the results obtained. First grade test scores are not a purely socioeconomic factor, like free or reduced lunch or one or two parent families, or educational level or income. Dr. Robert Crain, plaintiffs' expert, argued that first grade test scores are an important measure of what a student knows about reading at the end of the first grade year, particularly since testing occurs in the spring after students have already had significant opportunities to develop skills. Tr. VI at 283, 253. If the Hillsborough County school system wanted to measure the "initial skills" of first graders, then it would have tested them upon entry into school, rather than after several months of schooling. Even Dr. Armor concedes that enough learning occurs in the first grade to increase IQ levels and improve cognitive skills, Tr. VII at 186-187. Clearly, a measure of how much a child has learned during a given period of school attendance is not a pure measure of a socioeconomic factor.

In fact, the use of first grade test scores as part of the academic achievement analysis begs the ultimate question at issue. Dr. Armor claims to be explaining that differences in the scores between black and white students are not linked to differential treatment of black and white students in the Hillsborough County school system. *See DX 1* at 20 ("other qualitative differences in curriculum or in teaching practices" may be "responsible for outcome differences such as test scores ...."). Nevertheless, by relying on first grade test scores from the Hillsborough County school system, Dr. Armor relies on factors *within* the control of the Hillsborough County school system to "explain" away whether or not these test scores are within the control of the Hillsborough County school system. In essence, his analysis leads the Court right back to the very question it posed to the parties: whether or not the vestiges of *de jure* discrimination have been eliminated in the Hillsborough County schools. Thus, Dr. Armor's analysis of academic outcomes does not demonstrate that any difference in academic outcomes between black and white students in Hillsborough County is the result of socioeconomic status, given the issues raised about the methodology.

On the third area in quality education, the evidence is suspension data, participation in the gifted program and drop out rates. The factor of suspension rates is included because it is an indicator of school treatment of black and white pupils. Tr. IV at 146-147. Gifted programs were included because these programs are popular programs with parents and, therefore, access to these programs for black students would be important. *Id.* at 147. Drop out rates indicate the rate at which black students are finishing school in proportion to their presence in the school district. *Id.* at 148.

The data indicates that black students are over represented in terms of suspensions and drop out rates, but under represented in terms of participation in gifted programs. *See id.* at 142-148. The suspension statistics indicate a particularly bleak reality for black students in Hillsborough County. In the area of suspensions, at all levels of the school system, black students are suspended at a far greater rate than white students. *PX 1* at 28; *see also* Tr. IV at 143-144. For the 1994-1995 school year, half of the black students at the middle school level received a suspension of some form. *PX 1* at 29; Tr. IV at 146.[27] This figure was twice as much as the rate of white students. *Id.* Of the black middle school students who received some form of suspension, the vast majority received out-of-school suspension, which means that instructional time was lost. *PX 1* at 29-30. In short, black students in Hillsborough County are losing more instructional time than white students as a result of the rate of suspensions. Defendants presented no witness to address these alarming suspension rates.

As a result of the foregoing, it is clear that the evidence in the record did not exist to support a *Report and Recommendation* finding that defendants were unitary with respect to quality education. Defendants have not presented sufficient data on resource allocation nor have they demonstrated that any differences in academic outcomes, such as test scores and suspension rates, are not linked to the prior *de jure* segregated school system. Under these circumstances, the elimination of racial discrimination in the area of quality

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[27] The Hillsborough County school system has two forms of suspension, in-school and out-of-school suspension. *See PX 1* at 29-30.

education has not been established and a declaration of unitary status in this area is not appropriate.

III. PLAINTIFFS OBJECT TO THE REPORT AND RECOMMENDATION FINDING THAT DEFENDANTS HAVE COMPLIED IN GOOD-FAITH WITH THIS COURT'S ORDERS

Analysis of the *Green* factors is only one part of a two-part test. "The District Court should address itself to whether the Board has complied in good faith with the desegregation decree since it was entered...." *Dowell*, 498 U.S. at 249-50. *See also Freeman,* 503 U.S. at 499 (Defendants have "an affirmative commitment to comply in good faith with the entirety of a desegregation plan"). The *Report and Recommendation* find that:

> The School Board has complied in good faith with this Court's desegregation orders for quite a long period of time. The testimony of the [sic] most School Board members, as well as the current Superintendent and those responsible for various facets of school operation demonstrates that defendants have accepted the principle of racial equality and will not revert back to a dual school system.

Report and Recommendation at 86. This finding is totally at odds with the evidence presented in this case. The *Report and Recommendation* cannot measure good-faith compliance when the 1991 *Consent Order* has not yet run its course. Indeed, given the applicable law in this area, all the evidence suggests that the requirement of good-faith compliance cannot be met.

"A finding of good faith ... reduces the possibility that a school system's compliance with court orders is but a temporary constitutional ritual." *Morgan v. Nucci,* 831 F.2d 313, 321 (lst Cir. 1987). The defendant school district must demonstrate "to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance." *Freeman,* 503 U.S. at 491. There is no basis for a conclusion that defendants have demonstrated to the "disfavored race" their good-faith commitment. In fact, the record evidence overwhelming demonstrates that the black community in Hillsborough County has little faith in the defendants.

Plaintiffs called eight black residents of Hillsborough County to testify at trial: Mrs. Doris Reddick, a member and then-Chair of the Hillsborough County School Board and defendant in this case[28], Mrs. Ann Porter, President of the

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[28] Significantly, although she was a defendant in this case, Mrs. Reddick testified that the Hillsborough County school system was not ready for unitary status. Mrs. Reddick is the only member of the Hillsborough County School Board who attended the all-Black public schools of the *de jure* segregated Hillsborough County school system. She testified about the inadequate and inferior facilities and equipment that she encountered as a Black student in the Hillsborough County schools. Tr. V at 21-23. "There were no ... kindergartens during that time for black children ... [and] sometimes not enough books for the children, and I also remember that some of the pages would be torn out, some of the covers or backs would be missing from the books.... [A]ll of the teachers ... [and] all of the children were black. There was no lunchroom at either of the schools that I was in." Tr. V at 21-22. Mrs. Reddick attended high school in an elementary school building, which "was not equipped with anything that a high school should have had for

Tampa Branch of the National Association for the Advancement of Colored People (NAACP[29]), Mrs. Joanna Tokely[30], President of the Tampa Branch of the Urban

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children." Tr. V at 23.

Mrs. Reddick testified that she does not believe that the Hillsborough County School system should be released from court supervision. Tr. V at 25, 30-31. As she explained:

> I am not sure we have actually crossed over the wall, and I mean the wall of equal distribution of everything that the unitary system calls for.
>
> Also, I know that history has a way of repeating itself, and I am reluctant to have us released now, Your Honor, and any other time that I see in the future.

Tr. V at 30.

[29] Through the NAACP chapters' Education Committee, Mrs. Porter is knowledgeable about complaints filed with the organization by black parents with children in the Hillsborough County public schools. Mrs. Porter testified that the Tampa Branch NAACP has received complaints during the past several years concerning various racially discriminatory actions and practices within the school system. She specifically identified employment discrimination in the school system and discriminatory special education placements as issues that have generated complaints to the NAACP in recent years. Tr. VI at 139, 141-43.

[30] On the basis of her experiences as an employee of the Hillsborough County public schools, her work with the Tampa Hillsborough Urban League, and her involvement as a parent, grandparent and godparent of Hillsborough County public schools students, Mrs. Tokley opposes the termination of federal court supervision of the Hillsborough County public schools. She testified about numerous situations or conditions which contribute to her feeling that "the school system is not ready" to be declared unitary yet. Tr. III at 187. *See generally id.* at 179-81, 188-89, 208-09.

League, Mrs. Mae King[31], a parent, Ronnie King II[32], a

One of the more recent (and graphic) examples of this which Mrs. Tokley testified about was a 1995 high school basketball game where some spectators began to yell racial epithets after her godson scored enough points to bring his team into the lead. Tr. III at 181, 208-09. No action was taken to stop this discriminatory conduct. *Id.* at 208-09. In addition, Mrs. Tokley testified that the school system's hiring and promotion of African Americans remains a matter of great concern and "is always" raised in meetings between the Superintendent and African American community representatives. Tr. III at 192-93.

[31] Mrs. Mae King is the mother of two children who attend Hillsborough County public schools. Tr. VI at 11. Mrs. King's daughter, Veronica, is a fifth-grader at Limona Elementary School and her son, Ronnie, is in the eleventh grade at Armwood High School. Tr. VI at 11. Mrs. King testified about several specific incidents which have caused her to believe that it is premature to terminate federal court supervision and grant unitary status in Hillsborough County. Tr. VI at 13-21, 26-28, 30-31, 37-40. For example, she described the physical separation of inner-city, black children from their classmates as they arrived at Limona each morning. Tr. VI at 16-17. Mrs. King also described an incident where black children were waiting on a long line to enter Limona's cafeteria to eat breakfast, and a "white child came up to the end of the line and a teacher escorted th[e] white child to the front of the line." Tr. VI at 35, 37. Mrs. King also expressed concerns about black students' limited participation in extracurricular activities at Armwood, and questioned whether school officials are sufficiently responsive to such concerns. Tr. VI at 18-21. Mrs. King was a student herself at the beginning of desegregation. Consequently, she "has never felt a part of the school" that she attended and has never been invited to a class reunion. She testified that she "just cannot sit back and allow [her] child to be educated in a system where he graduates ... and never feel[s] a part [of the school]." Tr. VI at 28.

[32] Ronnie King, a 16-year-old member of Armwood High School's class of 1998 testified concerning his experiences as an African American student in the Hillsborough County public school system. Tr. VI at 41-56. His current courses include gifted level mathematics, science, history, and English classes. He is the only

student, Mr. Darrell Daniels[33], a parent, Dr. Sam Horton[34],

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Black student in each of these classes. Tr. VI at 44. While he acknowledges the difficulties of being in such an extreme minority in most of his classes and activities, Ronnie nevertheless feels that his presence helps to counteract stereotypes:

> [I]n my classes they have this image of blacks just being ... athletes.... And at least they're able to see one face ... [and] they [can] say, Well, you know, this is a black student ... that plays sports and has good grades, you know.

Tr. VI at 49.

[33] Darrell Daniels, an African American parent of two children who attend Hillsborough County public schools believes that federal court supervision of the desegregation of Hillsborough County schools should not be terminated yet. Tr. VI at 57-79. Daniels' 10-year-old son, Brandon, is in the fourth grade at Robles Elementary School. His 8-year-old son, Dominique, is in the third grade at Foster Elementary School. Tr. VI at 57-58. His fiancee's children attend Essrig Elementary School. Tr. VI at 59. When asked to compare Robles to Essrig, Mr. Daniels stated that the two schools were like "night and day." Tr. VI at 59-60. The Robles student body is 91 percent African American, while only 16 percent of the children enrolled at Essrig are African American. PX 4 at 3, 5. He testified that, "if [he] had a choice", he would prefer for his son to attend a different school than Robles. Tr. VI at 60. His specific concerns are that fewer resources are available at Robles, and that the staff of many inner-city schools discourage parental involvement and do not have the same commitment to education as the staff of suburban schools and schools with larger white student enrollments. Tr. VI at 59-60, 63-67, 70-72, 76-77.

[34] Dr. Sam J. Horton was employed by the Hillsborough County school system for more than 42 years. Tr. VI at 80. He retired in 1991 after 14 years of service as General Director of Secondary Education for the Hillsborough County schools. *Id.* Between 1950 and 1977, Dr. Horton worked as a teacher, assistant principal, or principal in five different Hillsborough public schools. Tr. VI at 84. Dr. Horton attended segregated public schools in

a former Hillsborough County school system employee and Minister Andrew Manning[35], the named plaintiff in this action.

Hillsborough County. Tr. VI at 95. Dr. Horton was the first -- and last -- African American to serve as General Director for Secondary Education in the Hillsborough County school system. Tr. VI at 88. Throughout his 42 years of service with the Hillsborough County school system, only one position at the Assistant Superintendent level was ever occupied by an African American -- the position of Assistant Superintendent for Support Services. Tr. VI at 88. In the years since Dr. Horton's retirement, Assistant Superintendent for Support Services remains the only position at the Assistant Superintendent level that is held by an African American. TR. VI at 89. Dr. Horton sought the Assistant Superintendent for Instruction position twice. Tr. VI at 89. He did not believe that the position was ever "advertised in a bulletin or nationally or that kind of thing," Tr. VI at 90-91, and he described a very informal hiring process where "you know that the vacancy exists", and then simply notify the Superintendent of your interest in the position. *Id.* Both times that Dr. Horton sought the Assistant Superintendent for Instruction position, he was passed over, and whites were hired instead. Tr. VI at 89-94.

On the basis of his experiences as a student and employee of the Hillsborough County public schools, and as an educator, Dr. Horton has "very serious concerns" about the termination of federal court supervision. Tr. VI at 96-97. He is concerned that some Hillsborough County schools "have the potential of re-segregating themselves ... [or] becoming ... one-race" Tr. 96-97, 99. He fears that termination of the desegregation order "might rob [Hillsborough County's] children of the chance to enjoy and practice the diversity" of the larger society. Tr. VI at 97-98. Finally, he is concerned that the current desegregation plan is too dependent upon specialized programs, which are more expensive, and therefore are easy targets when budgets tighten or shrink. Dr. Horton testified that "if history repeats itself, those schools that are predominantly black ... will not get adequate resources to maintain that program." Tr. VI at 98.

[35] Minister Andrew Manning was a fourth grade student at Dunbar Elementary School in 1958 when his

Each of these witnesses testified that the court-monitored school desegregation should continue. Each of these witnesses expressed concern about the educational opportunities that would be available to black students in the Hillsborough County public school system if federal court supervision is terminated and unitary status is granted. In contrast, defendants failed to call a single black witness in support of the proposition that the black community is satisfied with the commitment shown by defendants to their interests, even one of their own School Board members. This evidence undercuts the argument that the "principle of racial equality has been accepted by defendants. In fact, it suggests a significant degree of racial polarization and isolation inconsistent of the type of evidence indicative of a lack of good faith. *See Green,* 391 U.S. at 442 (not a racially divided district "but just schools").

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mother, Mrs. Willie Mae Manning, began this litigation. Tr. VI at 104-05. At the time, both the students and faculty of Dunbar were all-black. Tr. VI at 106. Dunbar was a "very crowded" school, with "limited equipment" and "old" textbooks. *Id.*

Minister Manning testified that, from his perspective, the objective of the litigation was to gain access to "a quality education." Tr. VI at 108. Even after his graduation from the Hillsborough County public school system, Minister Manning remained interested in and involved with the lawsuit. Tr. VI at 112. He is concerned that black students have borne most of the burden of implementation of the desegregation order. Tr. VI at 114-17. Nevertheless, Minister Manning does not believe that federal court supervision of the Hillsborough County school system should end now. Tr. VI at 115-17. He believes that the schools "have not completely eliminated the vestiges of segregation, and he "feel[s] that there is a distrust in the black community ... [and] unhappiness with the School Board" which must first be addressed. Tr. VI at 113, 115.

Other evidence raised questions about how defendants carried out their obligations under court decrees. Defendants do not engage in an affirmative marketing efforts for the m-m program. *See* Tr. I at 87-93. Yet, defendants clearly know how to engage in such a program, given the extensive recruiting efforts for magnet schools. Tr. I at 145-150.[36] Defendants know the rules for special transfers, such that they deem it inappropriate not to deny special transfers, even though special transfers may further segregate a school. *See PX 6.* Yet, Dr. Miliziano, the school official with the most significant day-to-day responsibilities for school desegregation, testified as to not realizing until recently that the m-m transfer program is applicable to the district's current situation. Tr. I at 91-92. The magnet program makes special efforts to recruit minority students, but then limits the access of black students to magnet programs to levels below those promised. *See PX 1c.* Furthermore, defendants have included a document entitled "Position Statement" in its reports to the Court, which states as follows:

> It is the position of the School Board of Hillsborough County to maintain as closely as possible enrollments at schools within or close to the capacity of the school, and to maintain a race ratio which is in keeping with the Federal desegregation order.

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[36] Defendants, *inter alia,* send out letters to every student in the Hillsborough County school system who is eligible to participate in the magnet program, and place radio and newspaper advertisements, paying special attention to media outlets with a predominantly black audience. Tr. I at 145-150.

This is accomplished in one of two ways:

1. When new schools are opening, boundaries, are drawn in such a way that a sufficient enrollment and race ratio is included at the new school and surrounding schools which are overcrowded or out of balance as to race ratios.

2. When overcrowding conditions are found at existing schools *and/or a race ratio significantly deviates from the desegregation plan,* the School Board is asked to make boundary changes to accommodate enrollments and race ratios.

Before boundaries are approved by the Board, community input is sought, and all actions of the Board regarding boundaries are reported to the Federal District Court.

DX 7 at Appendix A-4 of the First Annual Report. This statement clearly indicates that defendants will take action to address any school with a "race ratio significantly deviat[ing] from the desegregation plan." *Id.* Having reported this position to the Court for four consecutive years, Tr. VII at 225-226, defendants now take the position that this statement was not a real policy of the Hillsborough County school system. *Id.* at 210-214. Defendants also suggest that this position was never really Board policy, although it was

reported to this Court as such, but rather was merely the personal statement of Dr. John Miliziano. *See id.* at 224-225.

Unfortunately, one of two things must be true and neither are consistent with defendants' good-faith obligation: (1) defendants submitted a statement purporting to be the position of the Hillsborough County School Board and that was not the case or (2) defendants submitted a position statement to this Court which was, in fact, the position of the Hillsborough County School Board, but now in the midst of litigation, have now decided to disavow that position. Either way, these statements are not only inconsistent with defendants' good-faith obligation, but must be viewed as an affirmative act of bad faith.

The testimony of Dr. John Heuer leads to further doubt about defendants' representations to this Court. From 1963 to 1982, Dr. Heuer served as the director of pupil administrative services for the Hillsborough County school system. Tr. VII at 8. In this capacity, he had the responsibility of implementing defendants' school desegregation plan, including participating in the submission of plans and annual reports to the Court. *Id.* at 9-10. In carrying out his duties, Dr. Heuer testified, that in part, he was guided by an ex *parte* comment made by this Court about what to do about increasing racial identifiability. *See id.* at 17-19 ("we felt that what he explained to us is we were not required to go back and make a change because we hadn't created the problem initially"). Yet, at no time, did he make an effort to make these comments known to the public, the Bi-Racial Committee or distributed in writing to someone in the school system. *Id.* at 41-42. Despite the existence of two very clear and extensive court orders issued in May and July of 1971, it is Dr. Heuer's

testimony that major decisions about school desegregation are based on one-time conversations, which are not clearly articulated and memorialized in court orders. Nothing could be more inconsistent with defendants' good-faith obligation.

Based on the foregoing, the finding in the *Report and Recommendation* that defendants have complied in good-faith with this Court's orders must be rejected.

IV. PLAINTIFFS OBJECT TO THE *REPORT AND RECOMMENDATION* FINDING THAT PLAINTIFFS' *MOTION TO ENFORCE ORDER* SHOULD BE DENIED

The *Report and Recommendation* finds that:

> Plaintiffs have only once alleged that defendants violated this Court's orders, in 1994. Those allegations were fully addressed in the Prior Report and Recommendation dated June 23, 1995 and the proposed findings and conclusions made therein are incorporated here by reference.

Report and Recommendation at 63. Plaintiffs object to this finding and the underlying finding in the previous Report and Recommendation on the basis that the Court's ruling was based on defendants' not having an affirmative constitutional obligation to desegregate to the extent practicable. Furthermore, this finding suggests that, under the 1991 *Consent Order,* plaintiffs have no right to address any problem with the implementation of the middle school plan, including the basic obligations imposed by this Court's 1971 *Order* and

the Constitution. The law does not provide any support for this proposition.

As stated above, where plaintiffs have alleged violations under this Court's 1971 *Order* and the 1991 *Consent Order,* the resolution of any alleged violation does not turn on whether plaintiffs have complained, but rather, whether defendants have acted in a constitutionally appropriate manner. To the extent that the *Report and Recommendation* apply a different standard in this inquiry, these findings are erroneous. Thus, plaintiffs' motion should not have been denied. The Magistrate Judge imposed a standard at odds with school desegregation law and such a standard is not entitled to any deference from this Court in reviewing the *Report and Recommendation.*

V. PLAINTIFFS DO NOT OBJECT TO THE IMPOSITION OF A TRANSITION PHASE IN THIS CASE

While ordinarily a transition phase is not necessary, if a school system is found to be unitary, plaintiffs contend that such a transition period would be appropriate in this case.[37] The existence of the 1991 *Consent Order* necessitates such a transition period. For purposes of this case, a transition phase would serve the useful purpose of guaranteeing that the protections provided to plaintiffs under this decree remains

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[37] Obviously, plaintiffs steadfastly maintain that any discussion of a transition phase suggests that unitary status is appropriate in this case. Plaintiffs do not and cannot agree with this proposition. As stated above, there is ample evidence in the record to demonstrate that unitary status is not appropriate at this time.

legally in effect in order to permit an orderly resolution to the case. However, such a resolution must delineate the nature and scope of the rights of the parties under such an arrangement. Otherwise, plaintiffs would have a right without a remedy.

Conclusion

For the foregoing reasons, plaintiffs object to the *Report and Recommendation* of the Magistrate Judge and urge the Court to reject the findings discussed herein.

Respectfully submitted,

Elaine R. Jones
Director-Counsel
Victor A. Bolden
Jacqueline A. Berrien
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street, 16th Fl.
(212) 219-1900

Attorneys for plaintiffs

Warren Hope Dawson
1467 Tampa Park Plaza
Tampa, Florida 33605
(813) 221-1800
Fla. Bar No. 103926

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Plaintiffs' OBJECTIONS TO THE REPORT AND RECOMMENDATION AND BRIEF IN SUPPORT OF PLAINTIFFS' OBJECTIONS, have been served by depositing the same in the United States mail, first class postage prepaid, on this October 10, 1997, addressed to the following:

W. CROSBY FEW
FEW & AYALA
Suite 202
109 N. Brush Street
Tampa, Florida 33602

THOMAS M. GONZALEZ
THOMPSON, SIZEMORE & GONZALEZ
Suite 200
209 N. Brush Street
Tampa, Florida 33601

/s/_____
VICTOR A. BOLDEN